INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

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(NICARAGUA *v.* UNITED STATES OF AMERICA)

VOLUME II

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE DES ACTIVITÉS MILITAIRES ET PARAMILITAIRES AU NICARAGUA ET CONTRE CELUI-CI

(NICARAGUA c. ÉTATS-UNIS D'AMÉRIQUE)

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The case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, entered on the Court's General List on 9 April 1984 under number 70, was the subject of Judgments delivered on 26 November 1984 (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392) and 27 June 1986 (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Judgment, I.C.J. Reports 1986*, p. 14). Following the discontinuance by the applicant Government, the case was removed from the List by an Order of the Court on 26 September 1991 (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Order of 26 September 1991, I.C.J. Reports 1991*, p. 47).

The pleadings and oral arguments in the case are being published in the following order:

Volume I. Application instituting proceedings; request for the indication of provisional measures and consequent proceedings; Memorial of Nicaragua (Jurisdiction and Admissibility).

Volume II. Counter-Memorial of the United States of America (Jurisdiction and Admissibility); Declaration of Intervention by El Salvador and observations thereon by Nicaragua and the United States of America.

Further volumes will contain the remainder of the documentation in the case (oral proceedings on jurisdiction and admissibility; Memorial of Nicaragua (Merits) and supplemental documents; oral proceedings on the merits; Memorial of Nicaragua (Compensation); correspondence).

In internal references bold Roman numerals refer to volumes of this edition; if they are immediately followed by a page reference, this relates to the new pagination of the volume in question. On the other hand, the page numbers which are preceded or followed by a reference to one of the pleadings only relate to the original pagination of the document in question, which, if appropriate, is represented in this edition by figures within square brackets on the inner margin of the relevant pages.

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L'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*, inscrite au rôle général de la Cour sous le numéro 70 le 9 avril 1984, a fait l'objet d'arrêts rendus le 29 novembre 1984 (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 392) et le 27 juin 1986 (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 1986*, p. 14). A la suite du désistement du gouvernement demandeur, elle a été rayée du rôle par ordonnance de la Cour du 6 septembre 1991 (*Activités militaires et*

paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), ordonnance du 26 septembre 1991, C.I.J. Recueil 1991, p. 47).

Les pièces de procédure écrite et les plaidoiries relatives à cette affaire sont publiées dans l'ordre suivant :

Volume I. Requête introductive d'instance ; demande de mesures conservatoires et procédure y relative ; mémoire du Nicaragua (compétence et recevabilité).
Volume II. Contre-mémoire des Etats-Unis d'Amérique (compétence et recevabilité) ; déclaration d'intervention d'El Salvador et observations du Nicaragua et des Etats-Unis d'Amérique sur cette déclaration.

Les volumes suivants contiendront le reste de la documentation concernant l'affaire (procédure orale sur les questions de compétence et recevabilité ; mémoire du Nicaragua (fond) et documents additionnels ; procédure orale sur le fond ; mémoire du Nicaragua (réparation) ; correspondance).

S'agissant des renvois, les chiffres romains gras indiquent le volume de la présente édition : s'ils sont immédiatement suivis par une référence de page, cette référence renvoie à la nouvelle pagination du volume concerné. En revanche, les numéros de page qui ne sont précédés ou suivis que de la seule indication d'une pièce de procédure visent la pagination originale du document en question, qui, en tant que de besoin, est reproduite entre crochets sur le bord intérieur des pages concernées.

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COUNTER-MEMORIAL OF THE UNITED STATES OF AMERICA (QUESTIONS OF JURISDICTION AND ADMISSIBILITY)

CONTRE-MÉMOIRE DES ÉTATS-UNIS D'AMÉRIQUE (QUESTIONS DE LA COMPÉTENCE ET DE LA RECEVABILITÉ)

INTRODUCTION AND SUMMARY

INTRODUCTION

1. In its Order of 10 May 1984, the Court decided that the written proceedings in this case should first be directed to questions of the jurisdiction of the Court to entertain Nicaragua's Application of 9 April 1984 against the United States of America (hereafter the "Application") and to questions of the admissibility of that Application. By Order dated 14 May 1984, the Court directed the Republic of Nicaragua (hereafter "Nicaragua") to file with the Court by 30 June 1984 a Memorial addressing those issues and directed that the United States of America (hereafter the "United States") file a Counter-Memorial on the same issues by 17 August 1984. The United States submits the present Counter-Memorial in accordance with the Court's Orders of 10 and 14 May and in response to Nicaragua's Memorial of 30 June 1984 (hereafter the "Nicaraguan Memorial").

2. The United States responds in this Counter-Memorial to the questions of jurisdiction and admissibility which the United States has determined to be presented by Nicaragua's Application and Memorial. The United States reserves its rights, including its rights under Article 79 of the Rules of Court, to object to any other question of jurisdiction or admissibility arising in the course of subsequent pleadings or proceedings.

3. The United States notes at the outset that, as Applicant, it is Nicaragua's burden to prove that the Court has jurisdiction and that its Application is otherwise admissible. The United States will demonstrate in this Counter-Memorial that Nicaragua has not met, and cannot meet, that burden. Specifically, the claims set forth in Nicaragua's Application are not within the jurisdiction of the Court because Nicaragua has not itself accepted the Court's compulsory jurisdiction in any respect. In addition, Nicaragua's claims do not come within the scope of the United States acceptance of this Court's jurisdiction. Further, Nicaragua's claims are, in any event, inadmissible because (1) they implicate the rights and interests of indispensable parties, (2) they have been properly committed to modes of peaceful resolution other than adjudication by this Court, and (3) they call for determinations entrusted by the Charter of the United Nations to the political organs of the United Nations.

4. Nicaragua's Application presents the Court with several important issues of first impression. With respect to jurisdiction, this is the first time that a State has attempted to invoke the Court's compulsory jurisdiction in the full knowledge that it had never itself accepted that jurisdiction. This is also the first time that a State has filed an Application seeking to invoke the Court's compulsory jurisdiction in the face of a properly and timely filed statement by the Respondent explicitly suspending the claims in the Application from the scope of the Respondent's declaration.

5. The most basic premise of the Court's contentious jurisdiction is that it rests on the consent of the parties. Where one party has not properly consented to that jurisdiction, the Court has no authority to adjudicate the dispute. *A*

fortiori, where, as here, *neither* party has consented, the lack of jurisdiction is manifest.

6. Nicaragua's claims raise issues of first impression of equal gravity with respect to the fundamental allocation of institutional competences under the United Nations Charter. This is the first time that an Application has alleged the existence of on-going armed hostilities and requested that the Court intervene in those hostilities. Even more importantly, it is the first time that a State engaged in armed aggression against its neighbors has sought to use the Court as a means of preventing another State from going to the assistance of those neighbors pursuant to the inherent right of individual and collective self-defense.

7. The United Nations Charter deliberately vested the political organs of the United Nations with the competence to deal with alleged acts of aggression or breaches of the peace. As evidenced by the very novelty of Nicaragua's claims, the United Nations Charter never contemplated that this Court would resolve allegations and counter-allegations concerning region-wide armed hostilities in the midst of those hostilities. Nicaragua's attempt to bring such allegations before the Court in the circumstances of this case thus attempts to circumvent an important, agreed allocation of institutional competences under the Charter.

8. The political organs of the United Nations and of the Organization of American States, moreover, have already endorsed the so-called Contadora process as the appropriate forum for the consideration of Nicaragua's security concerns. Those negotiations, to which Nicaragua is a party, permit, unlike the present judicial proceeding, a resolution of Nicaragua's grievances in conjunction with the grievances of other Central American States against Nicaragua. The Contadora negotiations, again unlike the present judicial proceeding, permit the resolution of complex social, economic and political problems of Central America as a whole; unless those underlying causal problems are satisfactorily addressed at the same time, any determination of competing security claims will ultimately be illusory. Nicaragua's attempt in its Application to isolate Nicaragua's claims from those of its neighbors therefore confronts this Court with the possibility of jeopardizing the Contadora negotiations in achievement of a successful resolution of the complex problems of the region as a whole.

SUMMARY OF ARGUMENT

9. As Applicant, Nicaragua bears the burden of demonstrating that the Court has jurisdiction and that its claims are admissible. This burden is recognized by the Court's Order of 14 May 1984 directing Nicaragua to address those issues first. The United States will demonstrate in this Counter-Memorial that Nicaragua has not met, and cannot meet, its burden. Nicaragua has conspicuously failed to prove even the first prerequisite of compulsory jurisdiction, namely that Nicaragua has itself filed an effective declaration accepting that jurisdiction.

10. The United States will demonstrate in this Counter-Memorial that, for each of several additional reasons, the Court does not have jurisdiction over the claims set forth in Nicaragua's Application. The United States will then demonstrate that, even assuming *arguendo* that the Court has jurisdiction, Nicaragua's claims are inadmissible.

11. The Court lacks jurisdiction, first, because Nicaragua attempts to invoke the Court's compulsory jurisdiction without itself having accepted that jurisdiction. This fatal defect in Nicaragua's Application goes to the very foundation of the Court's compulsory jurisdiction system. Each State participating in that system does so only with respect to other States accepting "the same obligation" under Article 36 (2) of the Statute of the Court. This precondition is itself derived from the most fundamental principles of international law — reciprocity and the equality of States. A State that has not accepted "the same obligation" may not, without seriously violating those principles, invoke the Court's compulsory jurisdiction.

12. Nicaragua's failure to accept the Court's compulsory jurisdiction and its consequent inability to invoke that jurisdiction against the United States are discussed in Part I of this Counter-Memorial. Nicaragua maintains that a declaration it made in 1929 with regard to the Permanent Court of International Justice must be "deemed" an acceptance of this Court's jurisdiction under Article 36 (5) of this Court's Statute. Article 36 (5), however, speaks only of declarations "still in force" when the Statute of the present Court became operative. This Court has stressed on several occasions that the purpose of this language was to secure a continuity in the compulsory jurisdiction of the Permanent Court, not to impose new, expanded obligations on States. Article 36 (5) thus did not apply in 1945 to Nicaragua's 1929 declaration and for a very simple reason: Nicaragua had deliberately refrained from the necessary legal acts to bring the 1929 declaration into force under the Permanent Court system.

13. Nicaragua attempts to avoid the ineluctable implications of the plain language and purpose of Article 36 (5) of the Court's Statute primarily by referring to confusion in the literature concerning Nicaragua's status with respect to the Court's compulsory jurisdiction. This confusion arises from equivocal statements by Nicaragua during the life of the Permanent Court that it *planned* to take the necessary legal steps to bring its declaration into force. Nicaragua did not take such steps, however, and in its Memorial concedes that it never undertook "a binding acceptance of compulsory jurisdiction" of the Permanent Court (para. 47). Nicaragua nevertheless now seeks to benefit from its own equivocation and from the confusion that Nicaragua's conduct has created.

14. The status of Nicaragua's declaration since the advent of the present Court has come under rigorous scrutiny only once before, in the negotiation and

mediation effort culminating in the *King of Spain Arbitral Award* case. Nicaragua and Honduras there entered into a specific *compromis* submitting the case to the Court — an act wholly unnecessary had Nicaragua's declaration been in force as a result of Article 36 (5). In the course of the negotiations that led up to that *compromis*, Nicaragua's Ambassador to Washington advised the United States that Nicaragua's 1929 declaration was not legally effective, and former Judge Manley O. Hudson advised Honduras that Nicaragua had not accepted the compulsory jurisdiction of the Court. The Registrar of the Court at the time concurred. After thoroughly examining, at Judge Hudson's request, the Court's records, the Registrar in 1955 advised Judge Hudson as follows:

> "I do not think one could disagree with the view you express when you say that it would be difficult to regard Nicaragua's ratification of the Charter of the United Nations as affecting that State's acceptance of the compulsory jurisdiction. If the Declaration of September 24th, 1929, was in fact ineffective by reason of failure to ratify the Protocol of Signature, I think it is impossible to say that Nicaragua's ratification of the Charter could make it effective and therefore bring into play Article 36, paragraph 5, of the Statute of the present Court."

The Director of the League of Nations Archives at Geneva subsequently advised the Registry, and the Registry advised Judge Hudson, that Nicaragua's "instrument of ratification was never deposited with the League of Nations Secretariat", thereby confirming the Registrar's conclusion that Nicaragua's 1929 declaration was "ineffective" under the Statute of the Permanent Court and could not have been brought "into play under Article 36, paragraph 5, of the Statute of the Court".

15. In short, the plain language and purpose of Article 36 (5) and the overwhelming evidence since its adoption indicate that Nicaragua cannot be deemed to have accepted the compulsory jurisdiction of this Court under that provision of its Statute. Had Nicaragua genuinely desired to accept the Court's compulsory jurisdiction, it could have readily done so by depositing a proper declaration pursuant to Article 36 (2) and (4) of the Statute. Nicaragua has not done so. Nicaragua may not be considered a State that has accepted "the same obligation" as other States under the compulsory jurisdiction system and, accordingly, may not invoke that jurisdiction against the United States.

16. The question of the legal effectiveness of Nicaragua's declaration requires only limited facts directly relevant to that declaration and its status. The remaining United States arguments require a more general familiarity with events in Central America as a whole. In Part II, therefore, the United States offers a brief overview of the current region-wide conflict in Central America sufficient to place in context the remaining United States arguments as to jurisdiction and admissibility.

17. The United States will show in Part II, first, that contrary to its assertions to this Court, Nicaragua is engaged in an armed attack against its neighbors. As United States Secretary of State George P. Shultz observes in his affidavit of 14 August 1984:

> "3. The information available to the Government of the United States through diplomatic channels and intelligence means, and in many instances confirmed by publicly available information, establishes that the Government of Nicaragua has, since shortly after its assumption of power in 1979, engaged in a consistent pattern of armed aggression against its neighbors. Other responsible officials of the United States Government, including the

> President and the responsible Committees of the United States Congress having access to such information, share this view. In addition, responsible officials of other States in the region have reached a similar conclusion based on their own sources of information.
>
> 4. The United States has abundant evidence that the Government of Nicaragua has actively supported armed groups engaged in military and paramilitary activities in and against El Salvador, providing such groups with sites in Nicaragua for communications facilities, command and control headquarters, training and logistics support. The Government of Nicaragua is directly engaged with these armed groups in planning ongoing military and paramilitary activities conducted in and against El Salvador. The Government of Nicaragua also participates directly in the procurement, and transshipment through Nicaraguan territory, of large quantities of ammunition, supplies and weapons for the armed groups conducting military and paramilitary activities in and against El Salvador.
>
> 5. In addition to this support for armed groups operating in and against El Salvador, the Government of Nicaragua has engaged in similar support, albeit on a smaller scale, for armed groups engaged, or which have sought to engage, in military or paramilitary activities in and against the Republic of Costa Rica, the Republic of Honduras, and the Republic of Guatemala. The regular military forces of Nicaragua have engaged in several direct attacks on Honduran and Costa Rican territory, causing casualties among the armed forces and civilian populations of those States." (Ann. 1, paras. 3, 4, and 5.)

18. The United States will further show that the complex political, military, economic and social claims and counter-claims in Central America are now subject, by the agreement of all governments concerned, including Nicaragua, to the multilateral negotiations known as the Contadora process. That process has been endorsed by the United Nations Security Council and the Organization of American States. The United States also endorses the Contadora process and has, in good faith, entered into collateral negotiations with Nicaragua to support that process.

19. The United States will show in Part III of this Counter-Memorial that, for two reasons, each having to do with the situation in Central America, Nicaragua's claims do not come within the terms of the United States declaration accepting the compulsory jurisdiction of the Court. Since the declarations of the two Governments do not, therefore, concur in comprising the claims within their scope, the Court lacks jurisdiction over Nicaragua's claims regardless of the Court's conclusions with respect to the status of Nicaragua's 1929 declaration.

20. Nicaragua's claims do not come within the scope of the United States 1946 declaration, first, because Nicaragua's claims arise under multilateral treaties, and all of the States that are parties to those treaties as well as parties to the underlying disputes are not parties to the case before the Court. Proviso "c" (hereafter the "multilateral treaty reservation") of the United States 1946 declaration accepting the compulsory jurisdiction of this Court stated that the declaration would not apply to:

> "disputes arising under a multilateral treaty, unless . . . all parties to the treaty affected by the decision are also parties to the case before the Court . . .".

The United States thus expressly excluded from its consent to the Court's compulsory jurisdiction multilateral disputes arising under multilateral treaties unless all of the treaty parties that would be affected by a decision of the Court were before the Court. By adopting the multilateral treaty reservation, the United States refused to be bound by a judicial construction of its rights and obligations under a multilateral treaty in the context of a specific, multilateral dispute unless that judicial construction were also binding on all of the treaty parties to that dispute.

21. Nicaragua's Application is based on allegations about United States compliance with its obligations under the Charters of the United Nations and the Organization of American States (hereafter the "OAS"). Those treaties subsume all the legal standards arguably applicable to Nicaragua's allegations and are, in any event, the applicable law between the Parties. All of the other Central American States are also parties to the two Charters and, moreover, are parties to the disputes on which Nicaragua's Application is based. Those other States are not, however, before the Court and cannot be compelled to enter this proceeding. Indeed, those States have expressly communicated to the Court their views that adjudication of Nicaragua's claims would be inappropriate.

22. Nicaragua's claims fall squarely within the multilateral treaty reservation. It is apparent from the face of Nicaragua's Application that the relief Nicaragua seeks cannot be granted without implicating the rights and obligations of its Central American neighbors. In the absence of the other Central American States, there cannot be a full and fair development of the facts relevant to Nicaragua's claim. And in their absence, neither the rights and obligations of the other Central American States, nor the rights and obligations of Nicaragua toward those States, can be determined by this Court.

23. Most importantly, if the Court were to grant the relief Nicaragua requests, only one affected State, the United States, would be bound by the Court's interpretation of rights and obligations under the Charters of the United Nations and the Organization of American States and the other multilateral conventions on which Nicaragua's claims are based. This is precisely the situation that the United States excluded from its declaration by means of the multilateral treaty reservation. Nicaragua's claims do not, therefore, come within the scope of the United States 1946 acceptance of the Court's compulsory jurisdiction. The implications of the multilateral treaty reservation are discussed in Part III, Chapter II, of this Counter-Memorial[1].

24. Further, on 6 April 1984, the United States filed with the Secretary-General a note modifying its 1946 declaration. That note temporarily suspended claims such as those presented in Nicaragua's Application from the scope of the United States declaration. Nicaragua acknowledges this but challenges the validity of the note itself. The United States will demonstrate in Part III, Chapter III, of this Counter-Memorial that the 6 April 1984 note, under the present law and practice of the Optional Clause system, was fully valid with immediate effect. Even if not valid *erga omnes*, moreover, the 6 April note was effective vis-à-vis Nicaragua, whose declaration, assuming for purposes of argument that it is valid at all, is subject to immediate denunciation and modification.

25. Finally, in Part IV of this Counter-Memorial, the United States will show that Nicaragua's claims are not admissible, irrespective of the validity of Nicaragua's declaration and irrespective of whether the claims are comprised

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[1] On the basis of Nicaragua's pleadings to date, the United States has determined not to invoke proviso "b" to the United States 1946 declaration (the so-called "Connally Reservation"). This determination is without prejudice to the rights of the United States under that proviso in relation to any subsequent pleadings, proceedings or cases before this Court.

within the terms of the United States declaration. On its face, Nicaragua's Application asks the Court to determine that the United States is engaged in aggression and a breach of the peace — in the midst of the armed hostilities on which these allegations are based. Such a determination in this case is entrusted by the Charter to the political organs of the United Nations. Under present circumstances, moreover, any such determination as that sought by Nicaragua, as well as the relief requested by Nicaragua, would directly and necessarily implicate the rights of other Central American States, including their right of self-defense and their right to request assistance from the United States to that end. Those States are, accordingly, indispensable parties in whose absence this case may not proceed.

26. General judicial discretion arising out of the nature of the judicial function also counsels against consideration of Nicaragua's Application by this Court. A court of law is not equipped to analyse and attempt to resolve the fluid situation presented by on-going armed hostilities, particularly hostilities involving numerous parties not before the Court. Nor is a court of law suited to addressing underlying social, economic and political circumstances which, if unresolved, will, as a practical matter, render illusory any determination of rights and obligations relating to armed hostilities. Such situations are more suitable for the political processes of negotiation, which are already engaged in the Contadora process to which Nicaragua is party.

27. The claims presented in Nicaragua's Application are, therefore, not within this Court's jurisdiction and are not admissible. The United States respectfully submits that the Court must therefore dismiss Nicaragua's Application with prejudice.

PART I. NICARAGUA HAS NOT INVOKED AN EFFECTIVE TITLE OF JURISDICTION

INTRODUCTION

28. As Applicant, Nicaragua has the burden of proving that the Court has jurisdiction and that the claim is well founded in fact and in law (Statute of the Court, Art. 53). As the United States will show in Part I of this Counter-Memorial, Nicaragua has failed to establish an effective title of jurisdiction.

29. Nicaragua never accepted the compulsory jurisdiction of the Permanent Court and has taken no action to accept the compulsory jurisdiction of this Court. Nicaragua may not, therefore, invoke the compulsory jurisdiction of this Court against the United States. In its Memorial, although not in its Application, Nicaragua has also attempted to base jurisdiction upon Article 36 (1) of the Statute and the Friendship, Commerce and Navigation Treaty between the two States. That treaty, however, is irrelevant to the dispute which is the subject-matter of the Application and, by its terms, does not provide a basis of jurisdiction. The FCN Treaty may not, in any event, be invoked for the first time at this stage of the proceedings.

30. The absence of a title of jurisdiction is a deficiency of such gravity that it should be addressed before any other issue as a plea in bar of fundamental importance (*Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 4, at p. 12). Nicaragua's failure to identify any valid title requires that Nicaragua's Application be dismissed.

CHAPTER I

NICARAGUA HAS NEVER ACCEPTED THE COURT'S COMPULSORY JURISDICTION AND THEREFORE HAS NO RIGHT TO INVOKE THAT JURISDICTION AGAINST THE UNITED STATES

Section I. Nicaragua Never Accepted the Compulsory Jurisdiction of the Permanent Court of International Justice

31. Nicaragua now concedes that it never accepted the compulsory jurisdiction of the Permanent Court of International Justice (hereafter the "Permanent Court") (Nicaraguan Memorial, para. 47). It nevertheless is necessary to recount the requirements of the Permanent Court system and Nicaragua's failure to satisfy those requirements because Nicaragua's argument that this Court has jurisdiction rests largely upon a fiction, namely that Nicaragua had accepted the compulsory jurisdiction of the Permanent Court except in respect of some "unimportant technicalities" that were "cured" by adherence to the United Nations Charter and the present Statute or by subsequent conduct of the Parties. In fact, Nicaragua never accepted nor intended to accept any obligation under the Protocol of Signature to the Statute of the Permanent Court, including Article 36 of that Court's Statute. Nicaragua's adherence to the Charter and subsequent conduct cannot constitute compliance with the requirements of the present Court's Statute for acceptance of compulsory jurisdiction.

A. Only Parties to the Protocol of Signature to the Statute of the Permanent Court of International Justice Could Accept that Court's Compulsory Jurisdiction

32. The Permanent Court of International Justice was established pursuant to Article 14 of the Covenant of the League of Nations. The Permanent Court was not an organ of the League. Rather, its Statute was an independent legal instrument to which States could become parties by depositing an instrument of ratification of a separate Protocol of Signature (M. Hudson, *The Permanent Court of International Justice: 1920-1942*, pp. 122-126 (1943) (hereafter "Hudson, *The Permanent Court*")). The Protocol of Signature was open to Members of the League of Nations and to States listed in the Annex to the League of Nations Covenant (6 *League of Nations Treaty Series* 380 (hereafter "*LNTS*")).

33. The Protocol of Signature stipulated the procedures by which a State could become party to the Protocol and, thereby, become party to the Statute of the Permanent Court:

> "The present Protocol, which has been drawn up in accordance with the decision taken by the Assembly of the League of Nations on the 13th December, 1920, is subject to ratification. *Each Power shall send its ratification to the Secretary-General of the League of Nations; the latter shall take the necessary steps to notify such ratification to the other signatory Powers. The ratification shall be deposited in the archives of the Secretariat of the League of Nations.*" (6 *LNTS* 380; *P.C.I.J., Series D, No. 1* (2nd ed.), p. 7 (italics added).)

The 1929 Protocol for the Revision of the Statute of the Permanent Court of

International Justice also required the deposit of an instrument of ratification with the Secretary-General of the League of Nations[1].

34. Thus, the Protocol of Signature and the Revision Protocol were both treaties requiring ratification and the deposit of an instrument of ratification. When a treaty expressly requires ratification as the means by which a State expresses its consent to become bound by the treaty, ratification is an indispensable requirement[2]. This *sine qua non* includes compliance with stipulations in the treaty concerning the means by which ratification is to be made effective.

35. The law requires strict compliance with formal procedures for accepting treaty obligations in order to ensure certainty of obligation. "Parties to international compacts must know when they become irrevocably bound by the compacts." (H. Blix, "The Requirement of Ratification", 30 *British Year Book of International Law*, p. 352, at p. 356 (1953).) So, too, parties to a treaty must know with certainty which other States are bound. The requirements stipulated in the particular treaty ensure such certainty. Accordingly, States could not become party to the Protocol of Signature and the Statute of the Permanent Court except by expressing their consent in the manner prescribed, namely by deposit of an instrument of ratification of the Protocol of Signature with the Secretary-General of the League of Nations (Hudson, *The Permanent Court*, pp. 125-128).

36. Article 36 of the Statute of the Permanent Court contemplated that parties might undertake an additional obligation by accepting the Permanent Court's compulsory jurisdiction, that is, the obligation to accept as respondent the jurisdiction of the Court upon the filing of an Application against that party. To facilitate this the 1920 Protocol of Signature contained the so-called "Optional Clause" by which parties to the Protocol could make declarations accepting the Permanent Court's compulsory jurisdiction:

> "The undersigned, being duly authorized thereto, further declare, on behalf of their Government, that, from this date, they accept as compulsory, *ipso facto* and without special Convention, the jurisdiction of the Court in conformity with Article 36, §2, of the Statute of the Court, under the following conditions . . ." (6 *LNTS* 380.)

37. As Judge Manley O. Hudson of the Permanent Court wrote in his treatise on that Court, the Optional Clause was:

> "a subsidiary, not an independent, instrument. It was designed to serve only as a text for the declarations referred to in paragraph 2 of Article 36 of the Statute, and as such declarations may be made by Members or States only 'when signing or ratifying the Protocol' of Signature 'or at a later moment', the signature and ratification of the Optional Clause are dependent upon the signature and ratification of the Protocol of Signature. *A State cannot*

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[1] 165 *LNTS* 357, *League of Nations Official Journal* (hereafter "*LNOJ*"), 10th Year, No. 12, 1929, p. 1843. The Revision Protocol came into force on 1 February 1936. Thereafter, acceptances of the Permanent Court's Statute constituted acceptances of that Statute as amended by the Revision Protocol.

[2] See *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23*, pp. 21-22; *Ambatielos, Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 10, at p. 43; Havana Convention on Treaties, 20 February 1928, Arts. 6 and 8, 22 *American Journal of International Law*, Supp., p. 138 (1928); Vienna Convention on the Law of Treaties, Art. 14; Harvard Law School Draft Convention on the Law of Treaties, 29 *American Journal of International Law*, Supp., p. 655, at pp. 739-778 (1935); J. Mervyn Jones, *Full Powers and Ratification*, pp. 111-112 (1946); A. McNair, *The Law of Treaties*, pp. 130-134 (1961).

become a party to the Optional Clause unless it becomes or has become a party also to the Protocol of Signature." (*The Permanent Court*, p. 451 (italics added).)

38. In short, a State could not accept the Permanent Court's compulsory jurisdiction unless it had properly ratified the Protocol of Signature and thereby had become a party to the Statute of the Permanent Court.

B. Nicaragua Never Became Party to the Statute of the Permanent Court

39. The following chronology shows that Nicaragua never became party to the Statute of the Permanent Court.

1. 14 September 1929: Nicaragua signed but did not ratify the Protocol of Signature

40. Nicaragua became a Member of the League of Nations on 3 November 1920, but did not sign the Protocol of Signature until 14 September 1929 when it also signed the Revision Protocol (*LNOJ*, 10th Year, No. 12, 1929, p. 1811).

2. 24 September 1929: Nicaragua made an ineffective declaration under the Optional Clause of the Protocol of Signature

41. On 24 September 1929, Nicaragua signed the Optional Clause and made the following declaration:

> "Au nom de la République de Nicaragua, je déclare reconnaître comme obligatoire et sans condition la juridiction de la Cour permanente de Justice internationale.
>
> Genève, le 24 septembre 1929.
>
> *(Signé)* T. F. MEDINA."

(88 *LNTS* (1929), Ann. XXII, p. 283.)

This was translated by the Registry of the Permanent Court into English as follows:

> "On behalf of the Republic of Nicaragua, I recognize as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice.
>
> Geneva, September 24, 1929.
>
> T. F. MEDINA."

(*P.C.I.J., Series E, No. 6 (1929-1930)*, p. 485.)

42. The declaration, however, was not and could not be legally effective, as Nicaragua had not ratified the Protocol of Signature and therefore had not become a party to the Statute of the Permanent Court (*P.C.I.J., Series E, No. 6 (1929-1930)*, pp. 56, 146; Å. Hammarskjöld, *Juridiction internationale*, pp. 669-670 (1938)). Correspondence on file in the League of Nations archives confirms that the declaration was not in effect[1].

43. By letter of 22 October 1929, the Government of Switzerland enquired whether Nicaragua's signature of the Protocol of Signature and of the Optional Clause was subject to ratification (Ann. 3). The Legal Adviser of the League of

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[1] Further inquiries at the League of Nations archives in Geneva have uncovered another file relating to Nicaragua, file No. 3C/12843/279, in addition to file No. 3C/17664/1589, reproduced and submitted to the Court in connection with the pleadings on provisional measures. Annex 2 contains an affidavit from Stephen R. Bond, United States Counselor for Legal Affairs in Geneva, concerning the additional file.

Nations Secretariat wrote in response that the Protocol of Signature was subject to ratification and that Nicaragua's signature would only have effect on the date of deposit of the instrument of ratification (Ann. 4). The Legal Adviser also exchanged similar letters with the Foreign Ministry of the Republic of Austria (Anns. 5, 6).

3. 1930-1935: Nicaragua's domestic consideration of the Protocol of Signature

44. By letter of 29 November 1930, Nicaragua's permanent representative to the League of Nations, T. F. Medina, advised the Secretary-General that the Protocol of Signature to the Statute of the Permanent Court would be submitted the next month for the approval of Nicaragua's National Congress (Ann. 7). In fact, no action was taken by Nicaragua for four years. On 19 December 1934, the Protocol of Signature (but apparently not the declaration) was introduced in the Nicaraguan Senate and was referred to committee (Ann. 8).

45. On 14 February 1935, Nicaragua's Senate gave its approval to the Protocol of Signature (Ann. 9). On 11 July 1935 the Chamber of Deputies followed suit (Ann. 10).

46. On 4 April 1935, the Foreign Minister of Nicaragua wrote to the Secretary-General of the League of Nations to report that the Protocol of Signature had been submitted to the Nicaraguan Congress and that, when internal ratification had been completed, he would submit the instrument of ratification to the Secretary-General of the League of Nations (Ann. 11).

47. On 6 May 1935, the Acting Legal Adviser of the League acknowledged the Foreign Minister's letter and stated that the Secretariat would be ready to facilitate the deposit of the instrument of ratification (Ann. 12).

48. In 1943, the Foreign Minister of Nicaragua furnished the United States Ambassador with an unsigned copy of a decree relating to the Protocols, reportedly signed on 12 July 1935 by the President of Nicaragua[1], the day after the Chamber of Deputies approved the Protocol of Signature (Ann. 13). The Foreign Minister indicated that the 12 July decree had never been published in *La Gaceta*. This was required by the second article of the decree and, apparently, by the Nicaraguan Constitution as well[2]. The Foreign Minister also told the

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[1] Nicaragua's Memorial does not mention this decree (Ann. 1).

[2] Article 100 of the Constitution of 1911 (which was in effect in 1935) provided that:

> "All draft legislation, once approved by both houses of Congress, shall be sent to the Executive within three days of such approval, so that he may approve it and publish it as law within ten days."
>
> ("Todo proyecto de ley, una vez aprobado por el Congreso en camaras separadas, se pasara al Ejecutivo, a mas tardar, dentro de tres dias de haber sido votado, a fin de que le de su sancion y lo haga promulgar como ley dentro de diez dias.") (E. A. Lejarza, *Las Constituciones de Nicaragua*, p. 655, at p. 671 (1958). Deposited with the Court by the United States in accordance with Article 50 (2) of the Rules of Court.)

In the case of treaties, the procedure following issuance of the ratification decree was to publish in *La Gaceta* the full text of the treaty, followed by both the *acuerdo* — by which the President gave his approval prior to submission to the Congress — and the ratification decree. An instrument of ratification signed by both the President and the Foreign Minister was then published shortly thereafter. This pattern is illustrated by the following treaties ratified by Nicaragua during 1935: Treaty on the Protection of Movable Property of Historic Value, XXXIX *La Gaceta*, pp. 950, 955-957, 996-997 (1935); Anti-War Treaty of Non-Aggression and Conciliation, XXXIX *La Gaceta*, pp. 772-773, 778-779, 789, 796-797, 804-805, 917 (1935); General Convention to Improve the Means of Preventing War, XXXIX *La Gaceta*, pp. 843-844, 852, 860, 868-869, 876-877, 883-884, 893 (1935); Agreement for the Suppression of the White Slave Traffic, XXXIX *La Gaceta*, pp. 1187-1188, 1196-1197, 1260 (1935).

United States Ambassador that there was no record of the instrument of ratification having been sent to Geneva, but that he would have the instrument prepared and sent.

4. 1936-1938: Nicaragua's withdrawal from the League of Nations

49. On 26 June 1936 Nicaragua announced its withdrawal from membership in the League of Nations. The withdrawal became effective on 25 June 1938 (*LNOJ*, 17th year, Nos. 8-9 (1936), p. 923; *P.C.I.J., Series E, No. 13 (1936-1937)*, p. 70). Nicaragua apparently did not participate in League activities from 1936 onwards. Neither the League Covenant nor the Protocols of Signature of the Permanent Court Statute dealt with the effect of such a withdrawal upon the capacity of a State to become a party to the Permanent Court's Statute or to accept the Permanent Court's compulsory jurisdiction[1]. As far as the United States is aware, the effect of Nicaragua's withdrawal on its signature and declaration was never addressed during the life of the League.

5. 1939-1946: Communications between Nicaragua and the League confirmed that Nicaragua had not accepted the Permanent Court's compulsory jurisdiction

50. On 29 November 1939 Nicaragua sent a telegram to the Secretary-General of the League through commercial telegraphic channels, received the following day. The telegram provided:

> "SECRETARIO SOCIEDAD NACIONES GINEBRA
> ESTATUTO Y PROTOCOL CORTE PERMANENT JUSTICIA INTERNACIONAL LA HAYA YA FUERON RATIFICADOS. ENVIARASELE OPORTUNAMENTE INSTRUMENTO RATIFICACION = RELACIONES." (Ann. 14.)

In English, this translates as follows:

> "SECRETARY LEAGUE NATIONS GENEVA
> STATUTE AND PROTOCOL PERMANENT COURT INTERNATIONAL JUSTICE THE HAGUE ALREADY RATIFIED. INSTRUMENT OF RATIFICATION WILL BE FORWARDED IN DUE COURSE = RELATIONS".

51. As is clear from its text, this telegram merely informed the League that Nicaragua had completed its domestic ratification procedure and *intended* to fulfill the requirements for ratification of the Protocol of Signature on the international plane[2]. The telegram was not intended to constitute the deposit of

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[1] Pursuant to the Council resolution of 17 May 1922, the Permanent Court was open to States not members of the League of Nations or mentioned in the Annex to the Covenant. However, declarations made by such States under Article 36 could not be relied upon, without special convention, vis-à-vis Members of the League or States mentioned in the Annex to the Covenant (*LNOJ*, 3rd year, No. 6, 1922, p. 545).

[2] "Ratification" properly refers to the act by which the consent of a State to be bound by a treaty is established on the international plane. But often "ratification" is used imprecisely to denote the approval of the instrument on the domestic plane by particular organs of a State. It is only ratification on the international plane that is relevant to the entry into force of instruments. See *Report of the International Law Commission on Its Eighteenth Session*, 4 May-19 July 1966, p. 7, at p. 23; Harvard Law School Draft Convention on the Law of Treaties, 29 *American Journal of International Law, Supp.*, p. 655, at pp. 757, 765 (1935).

the instrument of ratification, nor was it interpreted as such by the League[1]. The Secretary-General did not publish or notify other Members of the League of the Nicaraguan telegram, as the Secretary-General would have done had Nicaragua's telegram constituted ratification of the Protocol of Signature, thereby making Nicaragua a party to the Court's Statute (see, e.g., *LNOJ*, 20th Year, Nos. 9-10, 1939, at p. 383; *LNOJ*, 21st Year, Nos. 1-3, 1940, p. 7).

52. On 30 November 1939, the Acting Legal Adviser to the League acknowledged receipt of the telegram to the Minister of Foreign Affairs of Nicaragua (Ann. 23). As in 1935, he stated that the Secretariat remained at the Minister's disposal to facilitate the deposit of the instrument of ratification.

53. By letter of 4 August 1942, Judge Hudson inquired of the League Secretary-General concerning the status of Nicaragua's accession to the Protocol of Signature and Optional Clause (Ann. 24). The Acting Legal Adviser's letter of 15 September 1942 stated:

> "We have not received the ratification necessary to complete the signature of the Court Protocol and at the same time to bring into force the obligations concerning Article 36. But on November 29th, 1939, the Secretary-General was informed by telegram that the Court Protocol was ratified by the President of the Republic of Nicaragua. We have however never received the instrument of ratification itself, which should have been sent to us. Nicaragua is therefore not bound either by the Protocol or by the optional clause." (Ann. 25.)

54. The Acting Legal Adviser on the next day wrote also to the Nicaraguan Minister of Foreign Affairs (Ann. 26). He referred to the 1939 telegram and noted that the League had not received the instrument of ratification that was necessary to bring Nicaragua's obligations into force.

55. The League of Nations files contain no response to the Acting Legal Adviser's letter of 16 September 1942, and there is no evidence that Nicaragua took any further action with respect to ratifying the Protocol of Signature to the Permanent Court's Statute. As noted above, in May of 1943 the Foreign Minister of Nicaragua told the United States Ambassador in Managua that Nicaragua had not completed its ratification of the Protocol of Signature and that he recognized that Nicaragua still needed to do so to become party to the Permanent Court's Statute (Ann. 13). Nicaragua has now confirmed in its Memorial that the instrument was not sent:

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[1] The telegram did not conform to the usual formalities, confirming that, as the text of the telegram makes clear, it was not intended to substitute for the instrument which, according to the telegram, was to "be forwarded in due course". See *Harvard Draft, op. cit.*, pp. 739-740 ("A ratification is usually a highly formal document").

Nicaragua's telegram may be compared with the letter of 16 July 1935, sent by the Foreign Minister of Turkey to the Secretary-General of the League (Anns. 15 and 16). The letter stated that the Grand National Assembly of Turkey had ratified Turkey's adhesion to the Protocol of Signature and to the Optional Clause, and that the instruments of adhesion would be transmitted shortly.

The League's Acting Legal Adviser, H. McKinnon Wood, responded by letter of 29 July 1935, emphasizing that the Protocols must be ratified (Ann. 17). Turkey signed the Protocol of Signature and made a declaration under the Optional Clause on 12 March 1936, but did not deposit an instrument of ratification (*P.C.I.J., Series E, No. 13 (1936-1937)*, pp. 51-52, 61-63). In keeping with the provisions of the Protocol of Signature, the Registry of the Permanent Court and the League of Nations considered that Turkey would not be bound by the Statute or the Optional Clause until the instrument of ratification was deposited, despite whatever domestic ratification requirements had been satisfied (Anns. 17-22).

> "In connection with this proceeding, the Government of Nicaragua has undertaken investigations in the official archives in Nicaragua. To date, no evidence has been uncovered that the instrument of ratification of the Protocol of Signature to the Statute of the Permanent Court of International Justice was forwarded to Geneva." (Ann. I.)

Thus, even if Nicaragua had completed its domestic ratification procedures, it did not attempt to effectuate its consent on the international plane[1].

56. Through 1945, Nicaragua was recorded in all official publications of the Secretary-General of the League of Nations, as depositary, as not having become party to the Permanent Court's Statute and as not having in force a declaration accepting the Optional Clause[2]. Nicaragua was fully aware of its status, for it was put on specific notice, not only by the Protocol of Signature itself but also in 1935, 1939, 1942 and 1943, that the deposit of the instrument of ratification was necessary for it to become party to the Statute of the Permanent Court and to bring its declaration into force.

57. Nicaragua does not dispute this history. Nicaragua now admits in its Memorial that it never deposited the instrument of ratification to the Protocol of Signature (paras. 6 (A), 13, 44, 86, and Ann. 1)[3]. Nicaragua also admits that its declaration never became effective under the Permanent Court's Statute and that Nicaragua never accepted the compulsory jurisdiction of the Permanent Court. As Nicaragua states in its Memorial, its declaration was in an "imperfect" state (para. 13), "inoperative" (para. 31), "insufficient in itself to establish a binding acceptance of compulsory jurisdiction" (para. 47), and not "fully in effect" (para. 27). The declaration, Nicaragua admits, required ratification "to give it binding force" (*ibid.*, para. 178 *(e)*). Nicaragua does *not* contend that its conduct evidenced an intent to be bound by the declaration[4], nor could such a contention be plausible in light of the many notices it received during this period. Thus, the Parties now agree that, with respect to the Permanent Court, Nicaragua's declaration never became binding, that is, the declaration never became an acceptance of the Permanent Court's compulsory jurisdiction.

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[1] As noted in para. 48, *supra*, and the accompanying footnote, the only evidence available indicates that Nicaragua did not complete its domestic ratification procedures. It is now clear, in any event, that Nicaragua never attempted to send an instrument of ratification during the war or after. Compare *Order of 10 May 1984, Request for the Indication of Provisional Measures*, para. 19.

[2] See *LNOJ, Special Supp.* 193, pp. 37, 42-43 (10 July 1944); reprinted in Ann. 27; *P.C.I.J., Series E, No. 7 (1930-1931)*, pp. 90, 159, 161; *No. 8 (1931-1932)*, pp. 55, 113, 115; *No. 9 (1932-1933)*, pp. 53, 72, 73; *No. 10 (1933-1934)*, pp. 35, 47, 48; *No. 11 (1934-1935)*, pp. 39, 50, 51; *No. 12 (1935-1936)*, pp. 54, 103, 110; *No. 13 (1936-1937)*, pp. 62, 63, 71; *No. 14 (1937-1938)*, pp. 49, 59, 60; *No. 15 (1938-1939)*, pp. 40, 48; *No. 16 (1939-1945)*, pp. 37, 50, 56 (with footnote).

[3] In light of these admissions, the United States does not understand the letter of 24 April 1984 from the Agent of Nicaragua to the Registrar of the International Court of Justice, claiming that "Nicaragua ratified in due course the Protocol of Signature of the Permanent Court".

[4] Nicaragua contends only that its conduct in 1946 and after, that is, after the dissolution of the Permanent Court, manifests assent to the jurisdiction of the International Court of Justice (Nicaraguan Memorial, para. 85 (i)). In any event, "implied consent" could never substitute for the deposit of the instrument of ratification, when such deposit is specifically required by the treaty in question, in this case the Protocol of Signature (*see* paras. 33-35, *supra*).

Section II. Because Nicaragua's Declaration Was Never an Acceptance of the Compulsory Jurisdiction of the Permanent Court, the Declaration cannot Be Deemed under Article 36 (5) to Be an Acceptance of the Compulsory Jurisdiction of the International Court of Justice

58. Nicaragua now contends that its declaration of 1929, although not in effect for the Permanent Court, was "deemed" to be an acceptance of the compulsory jurisdiction of this Court when Nicaragua became a Member of the United Nations on 24 October 1945. It is not clear whether Nicaragua's theory is that an admittedly non-binding declaration under the Permanent Court was nevertheless "in force" for purposes of Article 36 (5) (see Nicaraguan Memorial, para. 47), or that an ineffective declaration somehow could be both brought "into force" by operation of Article 36 (5) and deemed to be an acceptance of the new Court's compulsory jurisdiction (see *ibid.*, para. 178 *(e)*). In either event, Nicaragua's theory is fundamentally inconsistent with Article 36 (5).

59. In this section, the United States will review each of the evidentiary sources Nicaragua has relied upon in its Memorial in support of its interpretation of Article 36 (5). These sources demonstrate that Article 36 (5) was intended only to preserve the effectiveness of those declarations that were in effect, that is, "in force" for the Permanent Court, as of the date of the declarant's adherence to the Statute of this Court. Article 36 (5) was not intended to expand the field of compulsory jurisdiction by giving effect to declarations that had never been legally in force for the Permanent Court. As far as the United States has been able to ascertain, no one has ever advocated the interpretation of Article 36 (5) that Nicaragua advances in its Memorial.

A. According to the Plain Meaning of the Words "Still in Force", Article 36 (5) Applies only to Declarations Binding the Declarant to Accept the Compulsory Jurisdiction of the Permanent Court

1. "In force" means "binding"

60. Article 36 (5) of the Statute of this Court provides:

> "Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

The key part of this paragraph is the phrase, "Declarations . . . which are still in force". The words "in force" have a standard meaning — "binding". An instrument that is binding upon a State is "in force" for that State; an instrument that does not bind a State is not "in force" for that State[1].

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[1] Harvard Draft Convention on the Law of Treaties, 29 *American Journal of International Law, Supp.*, p. 653, at p. 787 (1935) ("come into force" same as "become legally binding", "take effect", "go into effect", "become operative", "mettre en vigueur" or "entrer en vigueur"); Vienna Convention on the Law of Treaties, 23 May 1969, Arts. 24, 25, 84; "Law of Treaties, Report by J. Brierly, Special Rapporteur", 1951 *Yearbook of the International Law Commission*, Vol. II, p. 70, at p. 71 ("enters into force" same as "becomes legally binding"); H. Briggs, *The Law of Nations*, p. 861 (2nd ed., 1952) ("in force" means "binding"); "Law of Treaties, Report by Sir Humphrey Waldock, Special Rapporteur", 1962 *Yearbook of the International Law Commission*, Vol. II, p. 27, at p. 71 ("basic rule" that "entry into force" means "binding").

61. This was the case for declarations under Article 36 of the Statute of the Permanent Court. Their sole purpose was to bind the declarant State to accept as respondent the jurisdiction of that Court upon the filing of an Application against it. Only declarations that so bound the declarant State were "in force" under the Permanent Court system. And declarations only became binding or "entered into force" if and when the declarant deposited an instrument of ratification to the Protocol of Signature. In his treatise, Judge Hudson explained this relationship in a passage entitled "Entry into Force of Declarations". The passage is set out here in full because it illustrates the standard meaning of the phrase "in force" when Article 36 (5) of this Court's Statute was drafted:

> "§449. *Entry into Force of Declarations.* Article 36, paragraph 2 [of the Permanent Court's Statute], does not require that a declaration be ratified; on the contrary, as the French version of the paragraph and both the English and French versions of the Optional Clause refer to the recognition or acceptance of jurisdiction 'from this date' (Fr., *dès à présent*), i.e., from the date of the declaration, it would seem that the declaration was intended to take effect at the time of signature. The text of the declaration may indicate that it is not intended to enter into force immediately, however, and conditions may be set by the declarant to postpone that event. A declaration which does not expressly require ratification may enter into force at the time of signature if the declarant simultaneously deposits or has previously deposited a ratification of the Protocol of Signature; otherwise such *a declaration will not enter into force until a ratification of the Protocol of Signature is deposited.* A declaration which expressly requires ratification may enter into force upon the deposit of the ratification if the declarant simultaneously deposits or has previously deposited a ratification of the Protocol of Signature; otherwise even though a ratification of the declaration is deposited, it will not enter into force until a ratification of the Protocol of Signature is deposited." (*The Permanent Court*, p. 452 (italics added) (footnotes omitted)[1].)

62. Contemporaneous interpretations of Article 36 (5) confirm that it uses the phrase "in force" in its ordinary sense. Thus, for example, former Judge S. B. Krylov of this Court, who participated in the 1945 United Nations Conference that drafted the Court's Statute, wrote that Article 36 (5) had the object of:

> "preserving in force those declarations concerning recognition of jurisdiction as compulsory (declarations as to the acceptance of the so-called 'optional clause') *which had been made by States parties to the Statute of the Permanent Court of International Justice*" (*Materials for the History of the United Nations*, Vol. I, p. 281 (1949) (italics added)[2]).

Judge Krylov clearly understood that declarations made by States which had not become party to the Permanent Court's Statute were not "in force" and thus were not preserved by Article 36 (5).

63. United States delegates to the San Francisco Conference also believed that "declarations . . . still in force" referred only to declarations that actually bound the declarant to accept the compulsory jurisdiction of the Permanent Court (see

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[1] *Accord*, Å. Hammarskjöld, *Juridiction internationale*, pp. 669-670 (1938) (declarations "en vigueur" did not include those, such as Nicaragua's, where the declarant had not ratified the Permanent Court's Statute).

[2] S. Krylov, *Materialy Istorii Organizatsii Obedinennykh Natsii: Sozdanie Teksta Ustava Organizatsii Obedinennykh Natsii*, p. 224 (USSR Academy of Sciences, 1949).

paras. 81-83, *infra*). And this was the interpretation adopted in the first *Yearbook* of this Court (see para. 132, *infra*).

64. This Court, too, has interpreted the words "still in force" in accordance with their customary meaning:

> "The declarations to which Article 36, paragraph 5, refers created for the States which had made them the obligation to recognize the compulsory jurisdiction of the Permanent Court of International Justice." (*Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria), Judgment, I.C.J. Reports 1959*, p. 127, at pp. 142-143.)

65. Indeed, the United States has been unable to find any commentary on the Statute of this Court suggesting that the words "in force" in Article 36 (5) were intended to encompass a declaration under the Permanent Court's Statute not binding upon the declarant State. Nor has Nicaragua presented any commentaries that suggest such an interpretation. Instead, Nicaragua has variously described its own declaration as "existing" (Memorial, para. 18), "in existence" (*ibid.*, para. 32), "on the books" (*ibid.*, para. 27), and "alive and subsisting" (*ibid.*, para. 27). If these phrases are intended to imply that the declaration was legally binding or "in force", they are simply wrong. By Nicaragua's own admission, the declaration was not binding for purposes of the Permanent Court; it needed ratification to bring it "fully into effect" (*ibid.*, para. 27; para. 57, *supra*).

66. The absence of any history or commentary supporting Nicaragua's construction of Article 36 (5) is significant. If the drafters intended to use the words "in force" in an unusual sense, indeed, in a sense contrary to their normal meaning, then one would expect to find some comment on that point. This is particularly true because the same phrase "in force" is used seven other times in this Court's Statute and in the United Nations Charter of which the Statute is a part, and each time the words are used in their customary meaning of "legally binding" (United Nations Charter, Arts. 102 (1), 106, 108, 110; Statute, Arts. 35 (2), 36 (1), 37).

2. *The French text of Article 36 (5) of this Court's Statute also requires that a declaration be binding under the Statute of the Permanent Court in order to be deemed an acceptance of this Court's jurisdiction*

67. Although the French text of Article 36 (5) does not use the precise phrase "still in force", it, too, assumes that only declarations that had come into force for the Permanent Court were to be preserved by operation of this Court's Statute. The French text states:

> "Les déclarations faites en application de l'article 36 du Statut de la Cour permanente de Justice internationale pour une durée qui n'est pas encore expirée seront considérées, dans les rapports entre parties au présent Statut, comme comportant acceptation de la juridiction obligatoire de la Cour internationale de Justice pour la durée restant à courir d'après ces déclarations et conformément à leurs termes."

68. The French text differs from the English only in its focus on duration. The French text makes explicit that for a declaration to be "still in force", its duration must not have expired; the English text does not stress this point separately. But the French text is in total agreement with the English that only declarations "in force" are subject to Article 36 (5), for only a declaration in force can "expire" or "not expire", or indeed be said to have a "duration" at all.

69. Sir Gerald Fitzmaurice explained this point in his draft articles on the law

of treaties prepared when he was Special Rapporteur to the International Law Commission. He distinguished formal validity, which concerns the conclusion and entry into force of treaties, and temporal validity, which concerns the duration and termination of treaties. Questions of temporal validity logically may arise only for instruments which have formal validity, that is, which have entered into force:

> "1. In order to be valid (i.e., in the present context, operative) a treaty, in addition to possessing formal validity arising from its regular framing, conclusion and entry into force . . ., must also possess temporal validity, or extension in time — i.e., duration.
>
> 2. A treaty possesses extension in time, i.e., duration, *so long as it has come into force and still remains in force*, i.e., has not expired or lapsed, or been terminated. Expiry or lapse brings the treaty to an end *ipso facto* and for all parties." (1957 *Yearbook of the International Law Commission*, Vol. II, p. 21 (italics added).)

In short, expiration presumes entry into force. The French text emphasizes temporal validity and presumes the formal validity — the entry into force — of the declaration. The English and French texts are thus entirely consistent. The French text merely clarifies the English text by making explicit what is implicit in the English text, the requirement of temporal validity.

70. The terms of treaties authenticated in two or more languages are presumed to have the same meaning in each authentic text (Vienna Convention on the Law of Treaties, Art. 33). Each of the other authentic texts of the Statute — Spanish, Russian and Chinese — uses an equivalent of the English phrase "still in force"[1]. The five authentic texts of Article 36 (5) thus have the same meaning only if the French text is understood to apply only to declarations that had entered into force. As this is also the natural meaning of the French text, it is the required interpretation[2].

71. The drafting history of Article 36 (5) at the San Francisco United Nations Conference confirms this result. The Article was originally circulated both in English and in French, using respectively the phrases "still in force" and "encore en vigueur"[3]. The French delegation proposed several changes, some of which affected both the English and French texts of Article 36 (5). One change introduced into the French text the phrase "pour une durée qui n'est pas encore expirée", but kept in the English text the phrase "still in force". (Proposals by the Delegation of France, doc. 947, *UNCIO*, Vol. 13, pp. 485, 486; Ann. 30.) The

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[1] The Spanish phrase, "aún vigentes", translates as "still in force". The Russian phrase, "prodolzhaiushchie ostavat sia'v sile" translates as "still in force". And the Chinese phrase, "xianreng you xiaozhe", translates as "still in force". These three languages and English and French are equally authentic (United Nations Charter, Art. III).

[2] Nicaragua's instrument of ratification of the Charter and Statute contained only the Spanish text (Ann. 28). This would confirm the need to give preference to the "still in force" phraseology were there determined to be a discrepancy between the French and the other four texts.

[3] Nicaragua misquotes the dissenting opinion in the *Aerial Incident* case when it states that Article 36 (5) "was first formulated in the French language" (Memorial, para. 15). In fact, that opinion actually states that the "final" version of the Article was originally drafted in French. *Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria), Judgment, I.C.J. Reports 1959*, p. 127, at p. 162. Article 36 (5) first appeared in the Report of Subcommittee D to Committee IV/1 on Article 36 of the Statute of the International Court of Justice, 31 May 1945, doc. 702, *United Nations Conference on International Organization, Documents* (1945), Vol. 13, pp. 557, 558 (English), 562, 564 (French) (hereafter "*UNCIO*"); Ann. 29.

French delegate explained that the changes "were not substantive ones, but were intended to improve the phraseology" (Summary Report of Nineteenth Meeting of Committee IV/1, doc. 828, *UNCIO*, Vol. 13, pp. 282, 284, 288, 290; Ann. 31). This comment, as well as the use of "still in force" in the English draft of the French proposal, confirms that the French delegate saw no distinction between the English and French versions. Indeed, the Rapporteur to Commission IV used interchangeably the phrases "still in force" and "for periods of time which have not yet expired"[1]. Thus the legislative history indicates that the French text was intended to have the same meaning as the English. Both apply only to declarations that (1) had entered into force, that is, became binding acceptances of the compulsory jurisdiction of the Permanent Court, and (2) which were still in force, that is, had not expired when the declarant became a Member of the United Nations.

3. Article 36 (5) cannot bring into force a declaration that had never been in force under the Permanent Court's Statute

72. Nicaragua argues:

> "The practice of Nicaragua provides compelling support for the proposition that its declaration of 1929 *came into force* as a result of Article 36 (5) . . ." (Nicaraguan Memorial, para. 74 (italics added))

and, again:

> "By ratifying the Statute of the new Court as an Original Member of the United Nations, before the Permanent Court was dissolved, Nicaragua perfected its declaration and *gave it binding force*." (*Ibid.*, para. 178 *(e)* (italics added).)

73. The plain language of Article 36 (5) precludes any such interpretation. First, the Article applies to declarations "which are *still* in force", that is, declarations which were *once* in force and which *remain* in force. This excludes any suggestion that Article 36 (5) of this Court's Statute itself could bring a declaration made under the Permanent Court's Statute into force for the first time. Second, as the Court itself recognized, the text requires declarations to have been in force *under the Statute of the Permanent Court*, for that is the only legal framework to which the Article could possibly refer (see para. 64, *supra*, para. 96, *infra*). But Nicaragua's declaration was never in force for the Permanent Court, either before or after Nicaragua became party to the Statute of this Court.

B. The Purpose and History of Article 36 (5) Confirm that It Does not Apply to Declarations, such as Nicaragua's, which Were not in Force for the Permanent Court

1. The general understanding

74. Participants in the San Francisco Conference debated whether to keep compulsory jurisdiction optional, or to create universal compulsory jurisdiction.

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[1] Report of the Rapporteur of Committee IV (1), doc. 913, 12 June 1945 (English), 13 June 1945 (French), *UNCIO*, Vol. 13, p. 381, p. 384 ("still in force"), p. 391 ("for periods of time which have not expired"), p. 416, p. 419 ("encore en vigueur"), p. 426 ("non expirées") (Ann. 32).

The Conference eventually decided against universal compulsory jurisdiction; States would not have to accept compulsory jurisdiction as a condition of joining the United Nations. Although the Conference thereby rejected proposals to expand the field of compulsory jurisdiction, it did agree to preserve as much as possible of the compulsory jurisdiction *that already existed* for the Permanent Court, whether by virtue of individual declarations already in force or by treaties already in force[1]. This was the origin and purpose of Article 36 (5).

75. This Court has previously described the origin of Article 36 (5):

> "At the time when the new Statute was drawn up, it was anticipated — and events confirmed this — that the Permanent Court would shortly disappear and these undertakings consequently lapse. It was sought to provide for this situation, to avoid, as far as it was possible, such a result *by substituting for the compulsory jurisdiction of the Permanent Court*, which was to come to an end, *the compulsory jurisdiction of the International Court of Justice*. This was the purpose of Article 36, paragraph 5. This provision effected, as between the States to which it applied, *the transfer to the new Court of the compulsory jurisdiction of the old*. It thereby laid upon the States to which it applied an obligation, the obligation to recognize, *ipso facto* and without special agreement, the jurisdiction of the new Court. *This constituted a new obligation which was doubtless, no more onerous than the obligation which was to disappear* but it was nevertheless a new obligation." (*Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria), Judgment, I.C.J. Reports 1959*, p. 127, at p. 143 (italics added).)

76. The authors of the joint dissent in the *Aerial Incident* case, upon which Nicaragua primarily relies (Nicaraguan Memorial, paras. 14-16), shared this assessment of the Statute's purpose:

> "Its purpose was to safeguard the *existing compulsory jurisdiction* in relation to the present Court notwithstanding the event clearly envisaged by the authors of paragraph 5, namely, the dissolution of the Permanent Court." (*Aerial Incident, op. cit.*, p. 169 (italics added).)

77. Judge Philip Jessup agreed that Article 36 (5) only carried over pre-existing obligations to accept compulsory jurisdiction:

> "It was clearly the intention in the drafting of the Statute of the International Court of Justice to preserve for the new Court just as much as possible of the jurisdiction which appertained to the old Court. For this purpose, Article 36 (5) provided for *the transfer of the obligations assumed by States which made declarations* under Article 36 of the old Statute, and Article 37 provided for a similar transfer where a 'treaty or convention' had contained a provision for the jurisdiction of the Permanent Court." (*South*

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[1] At the Washington Committee of Jurists meeting which preceded the San Francisco Conference, it was decided that the debate about universal and optional compulsory jurisdiction would require political resolution. The Committee therefore provided the Conference with alternative texts reflecting each view (*UNCIO*, Vol. 14, p. 821, at p. 841 (report of Jurist 86)). At the same time, the concerned Subcommittee noted that many nations had already accepted compulsory jurisdiction under the optional clause of the Permanent Court's Statute. The Subcommittee therefore recommended "that provision should be made at the San Francisco Conference for a special agreement for continuing these acceptances in force for the purpose of the Statute" (*UNCIO*, Vol. 14, p. 289 (report of Jurist 41)).

> *West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319, sep. op. at p. 415 (italics added).)

Similarly, Judge Tanaka, in his separate opinion in the *Barcelona Traction* case, expressed his view that "the essential purpose" of Article 36 (5) was "the continuity of the acceptance of compulsory jurisdiction" (*Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6, sep. op. at p. 71[1]).

78. In sum, Article 36 (5) was only intended to preserve declarations in force under the Permanent Court's Statute and not to bring declarations into force for the first time.

2. *The United States understanding of Article 36 (5)*

79. The United States understanding, both at the San Francisco Conference and in making its own declaration for the new Court under Article 36 (2), was also that Article 36 (5) applied only to declarations in force for the Permanent Court. The United States specifically understood that Nicaragua was *not* one of those States that would be deemed to have accepted this Court's compulsory jurisdiction for purposes of reciprocity under Article 36 (2).

80. The United States delegation to the San Francisco Conference reported the proceedings to the President on 26 June 1945, and a copy of this report was submitted to the Senate on 9 July 1945[2]. The Report described Article 36 (5) as

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[1] Members of the Court have ascribed a similar purpose to Article 37 and Article 36 (5). In *Barcelona Traction*, for example, the Court stated with respect to Article 37:

> "It was intended to preserve a conventional jurisdictional field from a particular threat, namely the extinction which would otherwise follow from the dissolution of the Permanent Court. But that was all it was intended to do. *It was not intended to create any new obligatory jurisdiction that had not existed before that dissolution.* Nor, in preserving the existing conventional jurisdiction, was it intended to prevent the operation of causes of extinction other than the disappearance of the Permanent Court." (*Ibid.*, p. 34 (italics added).)

An identical view of Article 37 was advanced by Judge Spender, one of the *Aerial Incident* dissenters, in the *South West Africa* cases, where he and Judge Fitzmaurice stated in their dissent:

> "In our view, the effect of Article 37 of the Statute of the present Court — and its sole relevant effect in the context of this case — was (as between the parties to the Statute) to substitute the present Court for the former Permanent Court in all cases in which under a 'treaty or convention in force', the Permanent Court would have had jurisdiction and would have been competent to hear and determine the case."

• • •

> "*Article 37 could only operate so as to confer on the present Court the pre-existing competence — whatever that was — of the Permanent Court, and not so as to confer a different or more extensive competence.*" (*Op. cit.*, pp. 469, 505 (italics added).)

[2] *Charter of the United Nations — Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State*, printed in *Hearings before the Committee on Foreign Relations, United States Senate, on The Charter of the United Nations for the Maintenance of International Peace and Security, Submitted by the President of the United States on July 2, 1945*, 79th Cong., 1st Session, July 9, 1945, pp. 34-206 (hereafter "*Report to the President*"; page citations are to the Senate hearings). Deposited with the Court by the United States in accordance with Article 50 (2) of the Rules of Court.

"*maintaining in force* with respect to the new Court, declarations made under the old Statute whereby many States *accepted* the compulsory jurisdiction of the old Court" (*Report to the President*, at p. 124 (italics added)).

81. Green H. Hackworth, the principal legal adviser to the United States delegation at San Francisco and later a member of this Court, described Article 36 (5) in similar terms. In testimony before the Senate Foreign Relations Committee in 1945 as it considered United States membership in the United Nations, Judge Hackworth explained that Article 36 (5) was intended to address the concern that —

> "states that had accepted compulsory jurisdiction under the present Court [the Permanent Court] would no longer be bound by their acceptance if a new Court were set up. That was taken care of by a provision in the Statute in article 36, that those *states which had accepted compulsory jurisdiction for the Permanent Court of International Justice would now substitute the proposed International Court under the same terms*." (*Report to the President*, at p. 338 (italics added).)

82. In the Senate hearings the following year on whether the United States should accept the Court's compulsory jurisdiction, this understanding was made even more explicit. Charles Fahy, then Legal Adviser to the Department of State, and, as Solicitor General of the United States, formerly a member of the United States delegation to San Francisco, told the Senate Foreign Relations Committee that the proposed United States declaration would be made only on condition of reciprocity:

> "As to particular states I think the situation as you point out is clear, that this resolution makes our declaration reciprocal; that is, only with respect to states which accepted similar jurisdiction.
>
> Declarations of the following 19 states thus came into force: Australia, Bolivia, Brazil, Canada, Colombia, Denmark, Dominican Republic, Haiti, India, Iran, Luxembourg, Netherlands, New Zealand, Norway, Panama, El Salvador, South Africa, United Kingdom, Uruguay.
>
> It is to be anticipated that a great many other states will deposit declarations. Under the old Court statute the total number who did this at one time or another was 44. In addition to the 19 mentioned above, whose declarations continue in force, this number included: Albania, Austria, Belgium, Bulgaria, China, Eire, Estonia, Ethiopia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Paraguay, Peru, Portugal, Rumania, Spain, Sweden, Switzerland, Thailand, Yugoslavia." (*Hearings before a Subcommittee of the Committee on Foreign Relations of the United States Senate on S. Res. 196*, 77th Cong., 2d Sess., July 11, 1946, pp. 141-142[1].)

83. The second paragraph quoted here, which listed "the 19 [States] . . . whose declarations continue in force", described the class of States which by virtue of Article 36 (5) could satisfy the requirement of reciprocity in the proposed United States declaration. Nicaragua was not included among these States. Nor was Nicaragua listed in the third paragraph among the 25 States that had at one

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[1] The United States is depositing this document with the Court in accordance with Article 50 (2) of the Rules of Court.

time accepted the compulsory jurisdiction of the Permanent Court but which were no longer bound. Thus, it was the understanding of the Department of State that Nicaragua's declaration had never been in force for the Permanent Court and that Nicaragua's declaration was not transferred to the new Court by operation of Article 36 (5).

84. In its Report approving the proposal for a United States declaration under Article 36 (2), the Senate Foreign Relations Committee also adopted this view of Article 36 (5). *The Report* stated:

> "The San Francisco Conference added an additional paragraph to article 36 of the statute, according to which *declarations accepting the jurisdiction of the old Court, and remaining in force, are deemed to remain in force as among the parties to the present statute for such period as they still have to run. Nineteen declarations are currently in force under this provision.*" (*Report of the Senate Committee on Foreign Relations on Compulsory Jurisdiction of the International Court of Justice, S. Rept. No. 1835*, 79th Cong., 2d Sess., at p. 105 (July 25, 1946) (italics added)[1].)

85. In sum, the United States delegation to San Francisco, the Department of State, and the Senate all understood *(a)* that Article 36 (5) applied only to declarations that were in force under the Permanent Court's Statute as of the date of adherence to this Court's Statute and *(b)* that Nicaragua's declaration did not fall within this category. Therefore, when President Truman made the 26 August 1946 declaration pursuant to Article 36 (2), it was the understanding of the United States that this declaration would not be effective with respect to Nicaragua unless and until Nicaragua had assumed the requisite reciprocal obligation by making a declaration under Article 36 (2) of the Statute of this Court.

C. Article 36 (5) Has Been Applied only to States that Had Accepted the Permanent Court's Compulsory Jurisdiction

86. In 1945 there were 24 States, including Nicaragua, which had submitted declarations under the Permanent Court's Optional Clause but whose declarations were not in force (*P.C.I.J., Series E, No. 16, 1939-1945*, pp. 49-50). For example, some States had become parties to the Statute and made declarations subject to ratification but had never ratified the declarations[2]. Some States, including Nicaragua, signed the Protocol of Signature and made a declaration under the Optional Clause but did not deposit the instrument of ratification to the Protocol of Signature that was required in order to bring into force for themselves both the Permanent Court's Statute and their declarations under the Optional Clause[3]. All of these declarations had the same legal status as Nicaragua's: none of them

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[1] The United States is depositing this document with the Court in accordance with Article 50 (2) of the Rules of Court.

[2] These were Czechoslovakia, Egypt, Guatemala, Iraq, Liberia and Poland (*ibid.*, p. 50).

[3] These were Argentina, Costa Rica, Nicaragua, and Turkey (*ibid.*, p. 50). Argentina's declaration was also subject to ratification and had not been ratified. There were also 14 States which had brought declarations into force, but whose acceptances had expired: Albania, Belgium, China, Ethiopia, France, Germany, Greece, Hungary, Italy, Lithuania, Peru, Spain, Romania and Yugoslavia (*ibid.*, p. 50).

was an effective acceptance of the Permanent Court's compulsory jurisdiction. None of these declarant States, including Nicaragua, was among those "bound by the [Optional] Clause" of the Statute of the Permanent Court (*ibid.*, p. 50). Despite this legal identity with Nicaragua's declaration, none of these other declarations has been deemed under Article 36 (5) to be an acceptance of this Court's compulsory jurisdiction.

87. Nicaragua contends that the drafters of Article 36 (5) intended to draw a distinction between one declaration which was not in force, Nicaragua's, and 23 other declarations which were not in force (Memorial, para. 48). Such a distinction would be inexplicable. None of these States had accepted the compulsory jurisdiction of the Permanent Court. None of these declarations was more or less "in force" than the others. Each of these declarations was "imperfect"; each of them could have been "activated" if the declarant State had taken the requisite steps to bring its declaration into force. If distinctions need to be drawn among these States, however, then those States which were party to the Protocol of Signature and which needed only to ratify their declarations were much "closer" than was Nicaragua to accepting the Permanent Court's compulsory jurisdiction. They at least were parties to the Statute of the Permanent Court, which was the subject of the declarations.

88. The only sensible distinction is that which appears in this Court's Statute, the distinction between declarations "still in force" and declarations not in force. This distinction is required by what the joint dissent in the *Aerial Incident* case described as —

> "the unchallenged principle that the jurisdiction of the Court must be invariably based on the consent of the parties and that it must not be presumed" (*I.C.J. Reports 1959*, p. 128, at p. 187).

To attribute consent to a State which previously had refrained from bringing its declaration into force would violate this fundamental principle. Instead, the Statute presumes consent only where there were actual acceptances, that is, declarations "still in force". The system under the present Statute is straightforward: States that had not already consented to the Permanent Court's compulsory jurisdiction at the time they joined the United Nations could accept this Court's compulsory jurisdiction by filing a declaration with the United Nations Secretary-General; if they did not wish to consent to compulsory jurisdiction, they did not need to take any action at all. Nicaragua's theory of Article 36 (5) would have required such a State, that is, a State that had made a declaration under the Permanent Court system, but had not brought it into force and did not want to accept the compulsory jurisdiction of this Court, to repudiate or terminate its previous, non-binding declaration. This could not have been the intent of the drafters of Article 36 (5). Moreover, no such State took any action to repudiate or terminate its previous, non-binding declaration, indicating again that no one understood Article 36 (5) to operate according to Nicaragua's current construction of that Statute.

89. The distinction Nicaragua has sought to draw between its declarations and all other declarations not in force for the Permanent Court is, in any event, illusory. This is made particularly clear by the treatment of Costa Rica and Turkey, two States whose status under the Permanent Court was essentially identical to Nicaragua's. Both, like Nicaragua, signed but never ratified the Protocol of Signature, and therefore never brought their declarations into force for the Permanent Court. Yet, the declaration of neither Costa Rica nor Turkey has been considered subject to Article 36 (5).

90. Nicaragua attempts to distinguish the example of Costa Rica by stating that Costa Rica's declaration —

> "was considered extinguished when Costa Rica withdrew from the League of Nations and renounced its obligations thereunder, including its declaration under the Optional Clause" (Memorial, para. 48).

In fact, Nicaragua, too, withdrew from the League of Nations, effective on 25 June 1938 (see para. 49, *supra*). Nicaragua has not described what actions Costa Rica took to "renounce its obligations". As far as the United States is aware, there were none, aside from its withdrawal from the League. Thus, Costa Rica and Nicaragua both signed but did not ratify the Protocol of Signature, both withdrew from the League, and both became original members of the United Nations. If joining the United Nations cured a declarant's failure to become party to the Statute of the Permanent Court, as Nicaragua asserts (Memorial, para. 178 (E)), then Costa Rica's declaration would have been transferred by operation of Article 36 (5). It was not.

91. Nicaragua also has failed to distinguish the case of Turkey. Turkey, too, had submitted a declaration under the Permanent Court's Optional Clause which never entered into force because Turkey never ratified the Protocol of Signature. The coincidence is especially striking because the Foreign Minister of Turkey informed the Secretary-General of the League, in a letter more formal but nonetheless reminiscent of Nicaragua's 1939 telegram, that Turkey's Grand National Assembly had ratified the Protocol of Signature and that he would not fail to send the instrument of ratification "shortly" ("sous peu") (Ann. 16). Turkey never did.

92. Turkey's declaration in 1936 was "for a period of five years" (Ann. 33). Nicaragua argues that because Turkey's declaration was "for a definite duration, [it] had expired", presumably in 1941 (Memorial, para. 48). Nicaragua is mistaken. The five-year period for Turkey's declaration had not expired because it had never begun to run. The declaration by its own terms accepted compulsory jurisdiction for a period of five years[1]. It would not become an "acceptance" and would not begin to run until Turkey deposited the instrument of ratification to the Protocol of Signature[2]. This is also how the Registry of the Permanent Court interpreted the declaration, for it did not include Turkey's declaration in its list of "Acceptances which have expired", published in the *P.C.I.J., Sixteenth Report, Series E, No. 16*, page 50. This Report covered the years in question (1939-1945). Moreover, it was the practice during the life of the Permanent Court to interpret time limitations in this way; unless the declaration specified otherwise, the time period was deemed to run only from the date the declaration became binding[1].

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[1] The declaration provided in pertinent part: "I recognize as compulsory . . . the jurisdiction of the Court . . . for a period of five years." (Ann. 33.)

[2] This is confirmed by the letter from the Turkish Foreign Minister to the Secretary-General. He reported that the National Assembly had approved Turkey's accession to the Optional Clause of the Statute subject to the condition that "elle sera valable pour une période de cinq ans" (Ann. 16). Since Turkey intended that its acceptance of the Optional Clause would be valid for five years, the five-year period could not begin until the declaration actually became an acceptance, i.e., when it entered into force.

[3] For example, both Lithuania and Ethiopia made declarations for a fixed number of years and later ratified the Protocol of Signature. Neither declaration was subject to separate ratification. In each case, the fixed period of years began running from the later date, the date of ratification of the Protocol of Signature — not from the earlier date, the date of the declaration.

93. In short, Turkey's declaration would begin running for a period of five years as soon as it was brought into force by the deposit of the instrument of ratification of the Protocol of Signature. Until then, Turkey's declaration subsisted in the same state as Nicaragua's. According to Nicaragua's interpretation, Article 36 (5) nevertheless should have been applied to Turkey's declaration under the Permanent Court. But it has not been.

94. In sum, Nicaragua's argument rests on the premise that, of the 24 declarations under the Permanent Court that were not binding upon the declarant in 1945, the drafters determined that 23 declarations would remain ineffective and that just one, Nicaragua's, would be deemed an acceptance of the new Court's compulsory jurisdiction. Such an argument is manifestly implausible and is contrary, in particular, to the treatment of the declarations of Costa Rica and Turkey.

D. This Court Has also Interpreted Article 36 (5) to Preserve, not to Expand, the Compulsory Jurisdiction of the Permanent Court

95. Whenever it has had occasion to address the issue, this Court has confirmed that only declarations that had entered into force and bound the declarants to the compulsory jurisdiction of the Permanent Court were to be transferred to the present Court. The issue first squarely arose in *Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria), Preliminary Objections* (*I.C.J. Reports 1959*, p. 127). Israel sought to rely through the operation of Article 36 (5) upon a declaration made by Bulgaria under the Permanent Court's Statute (*ibid.*, p. 135). Bulgaria's declaration had entered into force on 12 August 1921 and was for an unlimited

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Lithuania submitted its declaration on 5 October 1921. The declaration was for a period of five years (*P.C.I.J., Series D, No. 6*, pp. 18-19 (1932)). On 16 May 1922, Lithuania deposited the instrument of ratification to the Protocol of Signature and, although not required by the declaration and superfluous, also a ratification of its declaration. The Registry later listed the declaration as having expired on 16 May 1927, five years from the date of the deposit (*P.C.I.J., Series E, No. 3*, p. 88).

Ethiopia submitted its declaration on 12 July 1926. The declaration was for a period of five years (*P.C.I.J., Series D, No. 6*, p. 40). Ethiopia deposited the instrument of ratification to the Protocol of Signature four days later, on 16 July 1926. The declaration did not require ratification and was not ratified. Ethiopia renewed its declaration in 1932, effective retroactively to 16 July 1931, five years after the instrument of ratification to the Protocol was deposited (*P.C.I.J., Series E, No. 9*, p. 294).

Similarly, when a State's declaration was subject to ratification, the declaration's time limitation was invariably interpreted to begin running only when the declaration came into force, that is, upon deposit of the instrument of ratification. Often the declaration provided expressly that the time period in the instrument would begin running from the date of ratification. This was true, for example, for declarations of the following States (cites are to *P.C.I.J., Series E*): Albania (*No. 7*, p. 465), Argentina (*No. 12*, p. 335), Austria (*No. 6*, pp. 472, 475), Czechoslovakia (*No. 6*, p. 481), Egypt (*No. 15*, p. 216), Hungary (*No. 6*, p. 476), India (*No. 6*, p. 482), and Yugoslavia (*No. 6*, p. 485). Often the declarations, like Turkey's, did not specify when the time period would begin to run, but such declarations were also interpreted to begin running on the date of ratification rather than on the date of signature. This was true for declarations of Canada (compare *No. 6*, p. 484 with *No. 16*, p. 336), Germany (*No. 9*, p. 290), Latvia (compare *No. 6*, p. 477 with *No. 11*, p. 256), New Zealand (compare *No. 6*, p. 480 with *No. 16*, p. 342), Norway (compare *No. 2*, p. 80 with *No. 6*, p. 474), Romania (compare *No. 7*, p. 460 with *No. 12*, p. 337), South Africa (compare *No. 6*, p. 480 with *No. 16*, p. 333), and Thailand (compare *No. 6*, p. 464 with *No. 16*, p. 344).

duration. Bulgaria, however, had not been an original Member of the United Nations. It became a Member on 14 December 1955, after the dissolution of the Permanent Court. This Court held that Bulgaria's declaration was not "still in force" at that date and accordingly could not be deemed to be an acceptance of the compulsory jurisdiction of the International Court under Article 36 (5). The *Judgment* is important because it repudiates the theory advanced by Nicaragua in this case.

96. The Court interpreted Article 36 (5) to apply only to States whose declarations were in force for the Permanent Court:

> "Article 36, paragraph 5, considered in its application to States signatories of the Statute, effects a simple operation: *it transforms their acceptance of the compulsory jurisdiction of the Permanent Court* into an acceptance of the compulsory jurisdiction of the International Court of Justice." (*Ibid.*, p. 137 (italics added).)

Elsewhere the Court described those States subject to the compulsory jurisdiction of this Court in accordance with Article 36 (5) as those —

> "which, at the time of their acceptance of the Statute [of the International Court], *were bound by their acceptance of the compulsory jurisdiction of the Permanent Court*" (*ibid.*, p. 145 (italics added). See also *ibid.*, pp. 142-143, para. 64, *supra*).

Thus, Article 36 (5) does not apply to Nicaragua's declaration because Nicaragua never accepted the compulsory jurisdiction of the Permanent Court.

97. The Court held more particularly that Bulgaria's declaration could not be transferred to the International Court because:

> "The legal basis for [Bulgaria's] acceptance in Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice, ceased to exist with the disappearance of that Statute. *Thus, the Bulgarian Declaration* had lapsed and *was no longer in force*." (*Ibid.*, p. 143 (italics added)[1].)

The particulars of the Court's reasoning apply equally well to Nicaragua. The legal effect, the "force", of a declaration under the Permanent Court system derived from the Statute of the Permanent Court. If that Statute was not in effect for the declarant when the declarant joined the United Nations, then the declaration under the Permanent Court system was not "in force". Bulgaria's declaration was not in force in 1955 because the Statute of the Permanent Court had lapsed; Nicaragua's declaration was not in force in 1945 because Nicaragua had never even been a party to that Statute.

98. The Court's analysis also undermines Nicaragua's contention that Article 36 (5) both brought its declaration into force and transformed the declaration into an acceptance of the compulsory jurisdiction of the International Court (Memorial, para. 178 (E)). The Court confronted and rejected nearly the same argument in *Aerial Incident*:

> "Since these declarations [of States not original Members of the United Nations] had not been maintained in being, it would then have been

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[1] The Court also held that Article 36 (5) applied only to prior declarations by States represented at San Francisco which became original Members of the United Nations (*ibid.*, pp. 136-139).

> necessary to reinstate lapsed declarations, then to transport their subject-matter to the jurisdiction of the International Court of Justice: *nothing of this kind is provided for by Article 36, paragraph 5* . . . Article 36, paragraph 5, governed the transfer from one Court to the other of still-existing declarations; in so doing, *it maintained an existing obligation while modifying its subject-matter.*" (*I.C.J. Reports 1959*, p. 138 (italics added).)

99. Finally, the Court rejected the argument that, in accepting the United Nations Charter and the Statute of this Court, Bulgaria also accepted the Court's compulsory jurisdiction:

> "If Bulgaria, which at the time of its admission to the United Nations was under no obligation [of compulsory jurisdiction], were to be regarded as subject to the compulsory jurisdiction as a result of its admission to the United Nations, the Statute of the Court would, in the case of Bulgaria, have a legal consequence, namely, compulsory jurisdiction, which that Statute does not impose upon other States. It is difficult to accept an interpretation which would constitute in the case of Bulgaria such a derogation from the system of the Statute.
>
> . . . .
>
> At the time when Bulgaria sought and obtained admission to the United Nations, its acceptance of the compulsory jurisdiction of the Permanent Court had long since lapsed. There is nothing in article 36, paragraph 5, to indicate any intention to revive an undertaking which is no longer in force . . . Bulgaria's acceptance of the provision does not constitute consent to the compulsory jurisdiction of the International Court of Justice; such consent can validly be given by Bulgaria only in accordance with Article 36, paragraph 2." (*Ibid.*, p. 145.)

Since Nicaragua, like Bulgaria, was not subject to the compulsory jurisdiction of the Permanent Court at the time it joined the United Nations, it is likewise impossible to regard Nicaragua's acceptance of the Charter and the Statute of this Court as manifesting also an acceptance of compulsory jurisdiction[1].

100. Nicaragua in its Memorial seeks to draw a contrary conclusion from *Aerial Incident*, primarily through reliance on the dissenting opinion of a small minority, three members, of the Court (paras. 14-16[2]). But even the dissent, like the majority, contradicts Nicaragua's theory.

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[1] The unstated presumption in Nicaragua's theory is that Nicaragua had in some sense given its consent to the compulsory jurisdiction of the Permanent Court and had withheld only its consent to the Statute of that Court. But the making of a declaration does not manifest consent to compulsory jurisdiction; only if the declaration is brought into force is there consent. In no sense had Nicaragua consented either to the Statute or to compulsory jurisdiction. Nicaragua signed the Protocol of Signature and the Optional Clause in 1929 but failed to bring them into force. This may have been because Nicaragua objected either to the Court system embodied in the Permanent Court's Statute, or to compulsory jurisdiction, or both, but Nicaragua's actions do not permit the presumption — which is absolutely essential to Nicaragua's theory — that Nicaragua had in any sense accepted or consented to compulsory jurisdiction.

[2] The Court held by twelve votes to four that it was without jurisdiction. Judges Lauterpacht, Koo and Spender appended a joint dissenting opinion, and Judge *ad hoc* Goitein appended a separate dissenting opinion. Notably, Judge Basdevant did not join the dissent. Judge Basdevant had been a member of the French delegation to the San Francisco Conference and presumably was familiar with the drafting of the French text of Article 36 (5), upon which the joint dissent relied heavily.

101. The majority and the dissent agreed that Article 36 (5) applies only to declarations which had entered into force for the Permanent Court. Indeed, the dissenters in the passage quoted in the Nicaraguan Memorial, paragraph 14, specifically recognized the requirement that the Permanent Court declaration had to be in force as of the time of adherence to the United Nations Charter and this Court's Statute. The dissent wrote:

> "This was the purpose of paragraph 5. They said, in effect: Whatever legal obstacles there may be, these declarations, provided that their period of validity has not expired — that is *provided that they are still in force on the day of the entry of the Charter into force or on the day on which the declarant State becomes a party to the Statute — shall continue in respect of the International Court of Justice.*" (*Aerial Incident, op. cit.*, pp. 167, 168 (italics added).)

102. The disagreement of the majority and the dissent concerned only the reasons that might render a declaration no longer in force (*ibid.*, p. 162). The dissent believed that a declaration *once in force* should not be ineligible for transfer to the new Statute simply through disappearance of the old Statute. As expressed in a passage quoted by Nicaragua, the intention of Article 36 (5) was "to continue in being something which was in existence, to *preserve existing acceptances*" (*ibid.*, p. 145 (italics added)). The dissent returns to this theme time and again. For example:

> "The formal, and, in effect, insignificant changes in the Statute of the new Court were not permitted to stand in the way of *the then existing compulsory jurisdiction of the Permanent Court* being taken over by the International Court." (*Ibid.*, p. 159 (italics added)[1].)

Thus, according to the dissent, Article 36 (5) applied only to actual and effective acceptances of the Permanent Court's compulsory jurisdiction — and not to so-called "potential jurisdiction" (Nicaraguan Memorial, para. 12). Although the dissent argued that Bulgaria should not be required to give what it regarded as a "double consent" (*Aerial Incident, op. cit.*, p. 187; Nicaraguan Memorial, para. 27), this was a reference to the fact that Bulgaria had *previously* given its consent to the Permanent Court's compulsory jurisdiction. The dissent's interpretation would not permit Article 36 (5) to apply to a declaration like Nicaragua's which had never come into force at all for the Permanent Court and thus did not constitute even a single consent[2].

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[1] See also *ibid.*, p. 160 ("the purpose of paragraph 5 was to provide 'for the continuing validity of existing adherences' to the Optional Clause"); p. 166 ("It was for the purpose of preserving for the new Court the compulsory jurisdiction which had been conferred upon the old Court" that Article 36 (5) was adopted); p. 169 ("Its purpose was to safeguard the existing compulsory jurisdiction").

[2] Nicaragua cites one passage from the dissenting opinion that mentions Nicaragua's Declaration (Memorial, para. 37). It is instructive to place this statement in context. Two members of the majority advanced the theory that the French text of Article 36 (5) showed it could only apply to declarations for a fixed term, not to declarations, like Bulgaria's (and Nicaragua's), for unspecified time periods (*ibid.*, pp. 148, 154). In response, the dissent stated: "if the interpretation contended for had been adopted by the Court in the present case, its result would be to invalidate, as from the date of the Judgment of the Court, the existing declarations of a number of States — such as Colombia, Haiti, Nicaragua and Uruguay" (*ibid.*, p. 193). It appears that the dissenters included Nicaragua and these other States in their listing simply because they were listed in the Court's *Yearbooks* as States whose declarations had been for unspecified durations, not because they were analysed and deemed to be still in force.

103. The full Court next examined Article 36 (5) in *Temple of Preah Vihear, Preliminary Objections* (*I.C.J. Reports 1961*, p. 17). Cambodia sought to rely on a document filed by Thailand with the United Nations Secretary-General in 1950 purporting to "renew" a declaration originally made in 1929 which had been renewed in 1940 for ten years. Since Thailand, like Bulgaria, had not joined this Court's Statute until after the dissolution of the Permanent Court, Thailand argued that its declaration must have lapsed before its accession to this Court's Statute and thus was incapable of being renewed (*ibid.*, p. 26).

104. The Court disagreed that Thailand was not bound. It held, unanimously, that Thailand's 1950 "renewal" of its declaration was, in fact, a new declaration under Article 36, paragraph 2, of this Court's Statute, even if incorrectly worded. In light of Thailand's admitted intention to be bound, the Court found that this filing satisfied the critical formality required by the Statute, the deposit of an acceptance with the Secretary-General of the United Nations under Article 36 (4) (*ibid.*, p. 31).

105. The case is of interest primarily because the Court could have reached the same result by reconsidering the *Aerial Incident* rationale. If declarations that lacked a statutory basis under the Permanent Court system could be transferred by Article 36 (5), then Thailand's declaration, which was made in 1940 for ten years, could have been transferred to the new Statute when Thailand became party to that Statute late in 1946. But the Court did not adopt this approach. As in *Aerial Incident*, the Court considered Article 36 (5)'s field of operation to exclude declarations under the Statute of the Permanent Court, such as Thailand's, which were not in force when the declarant joined the United Nations.

106. The Court's decision in *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections* (*I.C.J. Reports 1964*, p. 4), again left the rationale of the *Aerial Incident* decision undisturbed. Belgium sought to invoke jurisdiction against Spain in part on the basis of their 1927 Treaty of Conciliation, Judicial Settlement and Arbitration, which provided in certain circumstances for reference of disputes to the Permanent Court (*ibid.*, p. 27). Belgium claimed this provision remained effective by operation of Article 37 of this Court's Statute.

107. Spain objected that, because it joined the Statute of this Court only after the dissolution of the Permanent Court, the treaty reference to the Permanent Court must have lapsed as in the *Aerial Incident* and *Temple* cases and could not be transferred. The Court by a vote of ten to six ruled in favour of Belgium and held that Article 37 of the Statute was applicable.

108. Article 37 provides:

> "Whenever a treaty or convention in force provides for reference of a matter . . . to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

In the Court's view, Article 37 "was not intended to create any new obligatory jurisdiction that had not existed" (*ibid.*, p. 34), but rather to transfer such jurisdiction as did exist, so long as the treaty on which it was based remained "in force". Because the *treaty* between Spain and Belgium had remained in force, "the obligation [to refer disputes to a court] remain[ed] substantively in existence" (*ibid.*, p. 38). The Court held that this satisfied Article 37.

109. Several features of this holding are noteworthy. First, this Court stressed that its focus was solely upon Article 37 of the Statute, which contains requirements different from those of Article 36 (5) (*ibid.*, p. 29). In particular, the requirement of "being in force", which under Article 36 (5) refers to the declaration itself, "is, in Article 37, formally related not to the clause as such,

but to the instrument — the treaty or convention — containing it" (*ibid.*, p. 29). Thus, the Court was careful to make clear that the only question before it was whether the *treaty* containing a compromissory clause remained "in force". The Court interpreted "in force" in its ordinary sense of "legally binding". Indeed, in addressing the particular features of the 1927 Treaty, the Court stressed:

> "it would be difficult either to deny the seriousness of the intention to create an obligation to have recourse to compulsory adjudication — all other means of settlement failing — or to assert that this obligation was exclusively dependent on the existence of a particular forum . . ." (*ibid.*, p. 38).

110. The holding of *Barcelona Traction* is thus that Article 37 of the new Statute applied to existing treaty obligations, notwithstanding the fact that one of the parties to the treaty may not have been an original Member of the United Nations. The fundamental premise of Article 37 is that a treaty obligation must have previously been in force and must have continued to exist, up until the time both treaty parties became parties to the Court's Statute. To the extent the decision has any relevance to the interpretation of Article 36 (5), it reaffirms that the drafters of the Statute of this Court did not intend to create additional obligations for States or a new field of compulsory jurisdiction for the Court, but only to preserve what had existed for the Permanent Court.

111. In its Memorial, Nicaragua has quoted portions of the judgment in an effort to portray *Barcelona Traction* as confirming the views that Nicaragua attributes to the dissent in *Aerial Incident* (paras. 16-18). In particular, Nicaragua emphasizes the passage in *Barcelona Traction* in which the Court observed that —

> "the notion of rights and obligations that are in abeyance, but not extinguished, is perfectly familiar to the law and represents a common feature of certain fields" (Memorial, p. 36).

Nicaragua then characterizes Nicaragua's "obligation" under the Permanent Court's Statute as having been —

> " 'in existence', although 'inoperative' or 'in abeyance' because of its failure to perfect the ratification of the Statute of the Permanent Court. Like Spain, by becoming a party to the present Statute and accepting all its provisions, including Article 36 (5), Nicaragua activated its declaration." (*Ibid.*, para. 31.)

In fact, Nicaragua's declaration under the Permanent Court could not possibly have been "in abeyance" because that term implies a temporary suspension of the operation of an instrument that had previously entered into force, whereas Nicaragua's declaration never came into force or effect at all. More fundamentally, however, Nicaragua's argument totally misconstrues the reasoning and holding of *Barcelona Traction*. The Court's Judgment on this question speaks for itself:

> "An obligation of recourse to judicial settlement will, it is true, normally find its expression in terms of recourse to a particular forum. But it does not follow that this is the essence of the obligation. It was this fallacy which underlay the contention advanced during the hearings, that the alleged lapse of Article 17 (4) [in the treaty] was due to the disappearance of the 'object' of that clause, namely the Permanent Court. But that Court was never the substantive 'object' of the clause. The substantive object was compulsory adjudication, and the Permanent Court was merely a means for achieving that object. *It was not the primary purpose to specify one tribunal rather than another, but to create an obligation of compulsory adjudication . . . If the*

> *obligation exists independently of the particular forum . . . then if it subsequently happens that the forum goes out of existence*, and no provision is made by the parties, or otherwise, for remedying the deficiency, it will follow that *the clause containing the obligation will for the time being become* (and perhaps remain indefinitely) *inoperative*, i.e., without possibility of effective application. But *if the obligation remains substantively in existence*, though not functionally capable of being implemented, *it can always be rendered operative once more*, if for instance the parties agree on another tribunal, or if another is supplied by the automatic operation of some other instrument by which both parties are bound. The Statute is such an instrument, and its Article 37 has precisely that effect.
>
> . . . .
>
> *What therefore happened in 1955*, when this *lacuna* was made good by Spain's admission to the United Nations, *was that the operation of the obligation revived, because the means of implementing it had once more become available; but there was neither any new creation of, nor revision of the basic obligation.*" (*Ibid.*, pp. 38-40 (italics added).)

112. These extracts from the Judgment illustrate vividly the error in Nicaragua's interpretation of *Barcelona Traction*. The case did not hold that this Court's Statute could create or revise an obligation to accept the Court's jurisdiction where none had existed before. Nor, as Nicaragua contends, could that Statute "perfect" an obligation which "may not have been perfected" (Memorial, para. 36). To the contrary, the case held that Article 37 required a treaty actually to be "in force" before the obligation it created could be transferred to the new Court, and that the temporary inability to implement that obligation while one party to the treaty was not a party to the Statute of the new Court, could not defeat the effect of Article 37. Nicaragua's situation in 1946 was fundamentally different: its "unperfected declaration" was not an obligation in force conferring jurisdiction on the Permanent Court, nor was it an obligation to recognize as respondent the compulsory jurisdiction of the Permanent Court. It was never a legal obligation at all. The Statute of this Court therefore cannot transfer any "obligation" of Nicaragua to this Court since there was none, and never had been one, under the Permanent Court.

E. The King of Spain Arbitral Award *Case*

113. The precise status of Nicaragua's declaration apparently has been a concrete issue of concern to States only once before these proceedings — when Nicaragua and Honduras considered referring their long-standing boundary dispute to this Court during the 1950s. The United States participated with the Organization of American States at that time to facilitate the negotiation of an agreement to refer the dispute to the Court. In Annex 34 the United States presents a somewhat more detailed history of these discussions based upon diplomatic records. The discussions and related activities of the parties reveal that Nicaragua, Honduras and the United States all believed and acted on the premise that Nicaragua's 1929 declaration was not a binding acceptance of the present Court's jurisdiction.

114. Honduras wished to bring the boundary dispute before this Court as early as 1955. However, Honduras did not file an Application because, as stated in a memorandum given by Honduras to the United States on 15 June 1955:

> "Nicaragua has refused until now to recognize the compulsory jurisdiction of the International Court of Justice so that the Court could take cognizance

> of and resolve the case which Honduras has considered filing against Nicaragua." (Ann. 34, App. C, para. 5.)

Shortly thereafter, Honduras engaged former Judge Manley Hudson to study, among other issues, whether Nicaragua might be compelled to accept the Court's jurisdiction in the matter. Judge Hudson evidently raised this question with the Registrar of the Court, indicating his doubts concerning Nicaragua's adherence to the Permanent Court's Statute. By letter of 2 September 1955, the Registrar responded to Judge Hudson as follows:

> "I do not think one could disagree with the view you express when you say that it would be difficult to regard Nicaragua's ratification of the Charter of the United Nations as affecting that State's acceptance of compulsory jurisdiction. *If the Declaration of September 24th, 1929, was in fact ineffective by reason of failure to ratify the Protocol of Signature, I think it is impossible to say that Nicaragua's ratification of the Charter could make it effective and therefore bring into play Article 36, paragraph 5, of the Statute of the present Court.*" (Letter of 2 September 1955 (italics added), Ann. 35[1].)

The Registrar inquired of United Nations authorities at the Palais des Nations in Geneva — where custody over the archives of the League of Nations had been placed — whether Nicaragua had ever submitted its instrument of ratification to the Protocol. A response came from Mr. Adrian Pelt, the Director, European Office of the United Nations. The Deputy-Registrar forwarded Mr. Pelt's response to Judge Hudson with a cover note advising Judge Hudson that the letter would seem to "completely answer [the question] which you had raised" (Ann. 36). Mr. Pelt's letter stated:

> "In order to make quite certain that the instrument of ratification had not been received at the time and put in the safe without a relevant mention having been inserted in the file, I had a search made through the contents of the safe. This search has not revealed the presence of the instrument of ratification under reference . . . The *instrument of ratification was never deposited with the League of Nations Secretariat.*" (*Ibid.*, p. 3 (italics added).)

115. Judge Hudson then prepared a formal legal opinion for Honduras (Ann. 37). After reviewing the historical background and the legal framework of both the Permanent Court system of compulsory jurisdiction and that of the present Court, he concluded as follows:

> "34. It must be borne in mind that the International Court of Justice has not determined whether there is any degree to which the Nicaragua Government is bound by the declaration of 24 September 1929, as to the International Court of Justice. Without such determination, it is impossible to say definitely whether or not the Government of Honduras may proceed against the Government of Nicaragua.
>
> 35. It would seem possible that some other jurisdiction may be envisaged in this connection; for example, the Parties might agree upon the dispute's being handled by a Tribunal *ad hoc*.
>
> 36. *It is also possible that the action should be begun against Nicaragua in*

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[1] The items in Annexes 35, 36, 37 and 38 have been retrieved from Judge Hudson's papers, which are on deposit and open to the public in the manuscript division of the Harvard Law School Library.

> *spite of the fact that that State is not bound by the second paragraph of Article 36 of the Statute of the International Court of Justice. If Nicaragua later agrees to the jurisdiction, the situation will be much the same as if it had agreed to a special agreement in advance of the case . . .*
>
> . . . .
>
> 40. It may be for other people to have their ideas as to what the Court will decide. The writer cannot speak for them; but *the writer would not be surprised if the Court should say that Nicaragua is not bound to submit to its jurisdiction*." (Ann. 37 (italics added).)

Later that same month Honduras apprised the United States of Judge Hudson's conclusions (Ann. 34, Apps. F and G).

116. During the course of conversations with the United States, Nicaragua confirmed to the United States that Nicaragua had *not* accepted the Court's compulsory jurisdiction. On 21 December 1955, the Nicaraguan Ambassador to the United States, Guillermo Sevilla-Sacasa, visited the Department of State. The memorandum of conversation for that meeting states:

> "Reference was made to the fact that the matter had not been previously referred to the Court because Nicaragua had never agreed to submit to compulsory jurisdiction.
>
> Ambassador Sevilla-Sacasa indicated that an agreement between the two countries would have to be reached to overcome this difficulty." (Ann. 34, App. K, p. 2.)

117. In March 1957, Honduras moved troops into the border area as part of a continuing effort to persuade Nicaragua to refer the long-standing dispute to the Court or other neutral body (Ann. 34, App. N). Honduras wanted to take the dispute to the Court and on 15 March 1957 made public its willingness to do so. Following Nicaragua's refusal to respond in a similar vein, Honduras took the dispute to the Organization of American States. During the months of May and June, a committee of OAS Member States (including the United States) facilitated the negotiation and signature of an agreement by Honduras and Nicaragua to take the dispute to the International Court of Justice. All involved appeared to believe that a special agreement was necessary because Nicaragua had not accepted the compulsory jurisdiction of this Court.

118. On 21 July 1957, Honduras and Nicaragua signed a *compromis*, known as the Washington Agreement. The Agreement provided that Honduras was to file an Application with this Court. As Nicaragua has noted (Memorial, para. 76), Honduras cited both the Washington Agreement and Article 36 (2) as bases of jurisdiction in its Application and subsequent Memorial. One can only speculate as to its reason for including the latter, given the special agreement between the parties[1]. Whatever the reason, Honduras implied that Nicaragua had ratified the Protocol of Signature and brought its declaration into force in 1939, and not that the declaration might have come into force for the first time by operation of Article 36 (5) of this Court's Statute (*I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906*, Vol. I, pp. 8-9, 39).

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[1] Honduras may have cited Article 36 (2), as suggested by Judge Hudson, in order to invite Nicaragua to accept jurisdiction, even if it would not otherwise be bound to do so. Also, Honduras may have cited Article 36 (2) in an attempt to expand the scope of the case to its advantage beyond what had been agreed in the Washington Agreement. This was Nicaragua's belief (*I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906*, Vol. I, p. 132).

119. Nicaragua objected strongly to the invocation of Article 36 (2). According to Nicaragua, the Court's jurisdiction over the case rested exclusively on the Washington Agreement (*ibid.*, Vol. I, p. 131). Nicaragua also argued that the case did not fall within Article 36, paragraph 2 *(c)*, which Honduras had cited (*ibid.*, p. 132).

120. In subsequent pleadings, Honduras dropped all reliance on Article 36 (2) and relied exclusively on the Washington Agreement as the title of jurisdiction (*ibid.*, Vol. I, p. 470; Vol. II, p. 13). And this Court in its Judgment nowhere recognized Article 36 (2) as the basis of jurisdiction[1].

121. In sum, both Nicaragua and Honduras believed throughout this entire period that Nicaragua was not bound by its declaration of 1929, and Nicaragua confirmed this to the United States. Those involved were aware of Nicaragua's failure to have accepted the Permanent Court's compulsory jurisdiction and therefore of Nicaragua's failure to have satisfied the requirements of Article 36 (5) of this Court's Statute. No one suggested that ratification of the United Nations Charter had altered Nicaragua's status with respect to the Court. Jurisdiction in the case was based upon a special agreement precisely because Honduras could not rely on Nicaragua's declaration.

F. Nicaragua Has Been Listed as Having a Declaration in Force in Various Publications only Because of Confusion over the Status of Its Declaration under the Permanent Court

122. Notwithstanding its own view during the period preceding the *King of Spain Arbitral Award* case that its declaration was not in force, Nicaragua claims in its Memorial that its new interpretation of Article 36 (5) "is confirmed and reenforced [sic] by the uniform practice of the interested States and international organizations for the past 38 years" (para. 40). But Nicaragua has cited no support for this proposition. Every authority referred to in Nicaragua's Memorial either expressly assumed that Article 36 (5) applied only to declarations in force for the Permanent Court or simply copied its listings of States from other sources. The only reason Nicaragua appeared on any of these listings was that, despite being fully aware of the confusion surrounding its declaration, Nicaragua made no effort to apprise the international community of its failure to carry through with its announced plans in 1935 and 1939 to ratify the Protocol of Signature of the Permanent Court.

1. The Yearbook *of the International Court of Justice*

123. Nicaragua places primary reliance on its appearance in the *I.C.J. Yearbook 1946-1947* as a State whose declaration was "deemed to be still in force" (Memorial, paras. 41-55). Close inspection reveals, first, that the Registry never listed Nicaragua's declaration as being unequivocally in force, and, second, that the Registry explicitly adopted an interpretation of Article 36 (5) exactly contrary to Nicaragua's interpretation.

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[1] Nicaragua states incorrectly in its Memorial that "[t]he Court recognized the bases of jurisdiction asserted by Honduras" (Memorial, para. 77). Rather, the Court merely noted without comment what had been asserted in the Application as is its normal practice; the Court did not "recognize" those assertions to be correct (*Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960*, p. 192, at p. 194).

124. The Registry took great care not to represent any of its listings as authoritative[1]. The *Yearbook* begins with a Preface stating:

> "It is to be understood that the *Yearbook* of the International Court of Justice is prepared and published by the Registrar and in no way involves the responsibility of the Court."

And the introduction to the Chapter on "Texts Governing the Jurisdiction of the Court" contains the further disclaimer that, "under present conditions, the particulars given below cannot be guaranteed as entirely accurate or complete" (*ibid.*, p. 197[2]).

125. In addition to these general disclaimers, when the Registry first included Nicaragua on its list, it did so with a prominent footnote:

> "According to a telegram dated November 29th, 1939, addressed to the League of Nations, Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice (December 16th, 1920), and the instrument of ratification was to follow. *Notification concerning the deposit of the said instrument has not, however, been received in the Registry.*" (*Ibid.*, at p. 210 (italics added).)

"Notification" presumably referred to notification from the League of Nations Secretariat, the depositary and the authoritative source of information concerning ratifications of the Permanent Court's Protocol of Signature. Evidently the Registry of this Court was uncertain whether the instruments of ratification had been deposited and, perhaps because of conditions existing in the immediate post-war period, and because of the dissolution of the League, did not receive notice from the League of Nations Secretariat as to the exact state of affairs. On the basis of Nicaragua's 1939 communication to the League, the Registry apparently listed Nicaragua in the belief that the instrument of ratification of the Protocol of Signature might have been deposited, but, quite correctly, noted that deposit in fact had not yet been confirmed.

126. If this Court's Registry had adopted Nicaragua's theory of Article 36 (5), the footnote in the *Yearbook* would have been superfluous because the deposit of the instrument of ratification would have been irrelevant. The *only* explanation for the footnote is that it was to alert readers to a possible defect in Nicaragua's declaration under the Permanent Court and to put them on notice that they could not rely upon the Registry's listing as conclusive[3].

127. Thus, taken as a whole, the first *Yearbook* did *not* treat Nicaragua as a State bound to the Court's compulsory jurisdiction by reason of its 1929

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[1] Nicaragua has erroneously asserted that information from the Registry concerning its declaration was necessarily "authentic" (Memorial, para. 54). In fact, the Registry has never had direct responsibility for the League of Nations archives, which alone can determine whether Nicaragua ever deposited an instrument of ratification to the Permanent Court's Protocol of Signature.

[2] The *Yearbook* was later seen to contain listings which were found to be inaccurate: Paraguay was later removed, and the declaration of Thailand (Siam) was later determined not to have been in force in 1947. (See *Temple of Preah Vihear* case, *op. cit.*, *I.C.J. Reports 1961*, p. 28.)

[3] The *Yearbook* also listed Paraguay's declaration as in force, despite Paraguay's earlier withdrawal of its declaration, but did so subject to a footnote. Thus, the Registry regarded the device of a footnote as sufficient to indicate grave doubts about a listing (see Nicaraguan Memorial, para. 51).

declaration. Rather, the *Yearbook* treated the declaration as one which *might* be in force, subject to confirmation that Nicaragua had made itself party to the Statute of the Permanent Court by actually depositing with the League the instrument of ratification of the Protocol of Signature.

128. Subsequent editions of the *Yearbooks* through 1954-1955 did not print the text of the declarations but referred readers back to the *I.C.J. Yearbook 1946-1947* and, in Nicaragua's case, to page 210 of that *Yearbook*, which contained Nicaragua's declaration and the footnote discussed above. In this way, the *Yearbook* continued to notify readers of the possible problem with Nicaragua's declaration.

129. The *I.C.J. Yearbook 1955-1956* was printed after the Registry's exchange of correspondence with the custodians of the League archives and with Judge Hudson. This edition retained the general format of the 1947 through 1954 *Yearbooks* but added a footnote to the listing of Nicaragua. This footnote, however, was not identical to the original 1946 footnote. Instead, the last sentence had been changed to reflect the information received from the League of Nations archives: "It does not appear, however, that the instrument of ratification was ever received by the League of Nations." (*I.C.J. Yearbook 1955-1956*, p. 195.)

130. There also appeared, in the list of States that had accepted the Court's jurisdiction, a footnote to the Nicaragua listing, instructing readers to "See footnote 1 on page 195" (*ibid.*, p. 183). A similar footnote was appended to the listing for Paraguay.

131. Beginning with the 1956-1957 edition, the *Yearbook* again began printing the full texts of declarations and continued to include the footnote to that of Nicaragua. In addition to the customary disclaimer in the Preface that the "*Yearbook* is prepared and published by the Registry and in no way involves the responsibility of the Court", a new disclaimer appeared at the beginning of the chapter on declarations:

> "The texts of declarations set out in this Chapter are reproduced for convenience of reference only. The inclusion of a declaration made by any State should not be regarded as an indication of the view entertained by the Registry or, *a fortiori*, by the Court, regarding the nature, scope or validity of the instrument in question." (*Ibid.*, at p. 207.)

The *Yearbooks* have continued to carry such a disclaimer. (See, e.g., *I.C.J. Yearbook 1982-1983*, p. 50.)

132. In short, the *Yearbook* has never listed Nicaragua's declaration without noting the possible defect, and the *Yearbook* has never asserted that its listing of declarations is authoritative or final. Equally significant, the *Yearbook* repudiates Nicaragua's theory that its 1929 declaration could have been brought into force by Nicaragua's ratification of the United Nations Charter. Rather, the *Yearbook* has been premised on the belief that Article 36 (5) of the Statute applies only to States which were "bound" by their "acceptance" of the Permanent Court's Optional Clause. The first *Yearbook* states in the preface to the list of acceptances of this Court's compulsory jurisdiction:

> "This list also includes communications and declarations of States Members of the United Nations which are *still bound by their acceptance of the Optional Clause of the Statute of the Permanent Court* of International Justice, since *their obligation under that Clause is extended to the new Court* by the terms of Article 36, paragraph 5 . . ." (*I.C.J. Yearbook 1946-1947*, p. 196 (italics added).)

The phrase "still bound" is used in two other places in the same book to describe the States subject to Article 36 (5)[1].

133. As in the original *Yearbook*, subsequent *Yearbooks* made clear that the Registry assumed that Article 36 (5) could only apply to States which had actually accepted the compulsory jurisdiction of the Permanent Court[2].

134. The *Yearbooks* therefore not only *never* have listed Nicaragua as having a declaration in force without noting the apparent defect, but also *never* have intimated that a declaration could be deemed in force if the declarant had failed to accept the compulsory jurisdiction of the Permanent Court.

2. United Nations publications

135. The various United Nations publications referred to by Nicaragua also assumed that only declarations in force could have been transferred to the present Court by Article 36 (5)[3]. Where these publications cite their source of information, they invariably refer to the Court's *Yearbook*[4]. None purports to carry any authority, none reveals any analysis, and none reflects any support for Nicaragua's interpretation of Article 36 (5). Indeed, as the 26 August 1946 edition of the *Weekly Bulletin* of the United Nations made explicit, they stand only for the proposition that "[t]he declarations which were made by States *parties to the Permanent Court* according to the Statute of the new Court obtain for the latter until they expire" (pp. 11-12 (italics added)).

3. Writings of publicists

136. The same can be said for the publicists cited by Nicaragua (Memorial, paras. 66-73). Three deserve special mention because they appear to have ana-

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[1] *I.C.J. Yearbook 1946-1947*, at p. 207 ("Communications and Declarations of States which are still bound by their adherence to the Optional Clause of the Statute of the Permanent Court of International Justice"); *ibid.*, at p. 221 (States "which are still bound by their acceptance of the Optional Clause of the Statute of the Permanent Court of International Justice").

[2] For example, the *I.C.J. Yearbook 1948-1949*, p. 36, states:

> "The following States have deposited with the Secretary-General of the United Nations the declaration recognizing the Court's jurisdiction as compulsory, *or had already accepted the jurisdiction of the Permanent Court* of International Justice as compulsory for a period that has not yet expired." (Italics added.)

[3] For example, the Secretary-General's second *Annual Report of the Secretary-General on the Work of the Organization* (see Nicaraguan Memorial, para. 61) describes its listing as reporting States "having under Article 36 of the Statute of the Permanent Court of International Justice *made declarations which have not yet expired accepting the jurisdiction of that Court . . .*" (*General Assembly Official Records*, Second Session, *Supp. No. 1* (A/315), July 1947, at p. 59 (italics added)). The annual publication of the Secretary-General's *Signatures, Ratifications, Acceptances, Accessions, etc., concerning the Multilateral Conventions and Agreements in respect of which the Secretary-General acts as Depository* (Nicaraguan Memorial, para. 62), entitles its table "States whose Declarations Were Made Under Article 36 of the Statute of the Permanent Court of International Justice and Deemed to be Still in Force". See, e.g., Vol. I, 1949, p. 18. See also, *Yearbook of the United Nations 1946-1947* (assuming Nicaraguan declaration entered into force in 1939 and thus was subject to transfer, a reference that was dropped in all subsequent *Yearbooks of the United Nations*).

[4] See, e.g., Secretary-General's *Signatures, Ratifications, Acceptances, Accessions, etc.*, Vol. I, 1949, p. 18 (referring to the *I.C.J. Yearbook 1947-1948*).

lysed Nicaragua's status. Each concluded that Nicaragua's declaration was not effective under Article 36 (5). The other publicists cited by Nicaragua do not support Nicaragua's construction of that Article and appear simply to have relied on the *Yearbook* or other sources for their listing of Nicaragua.

(a) *Professor Salo Engel*

137. Professor Engel had been special assistant to the Registrar of the Permanent Court of International Justice from 1941-1946, and thus may have been directly familiar with the status of Nicaragua's declaration during the life of the Permanent Court. Professor Engel summarized his views in an article, "The Compulsory Jurisdiction of the International Court of Justice", 40 *Georgetown Law Journal*, page 41 (1951).

138. Professor Engel first set forth the requirements for Article 36 (5) of this Court's Statute to apply to declarations made under the Statute of the Permanent Court:

> "(1) They [such declarations] were made by States which became parties to the new Statute . . .; and (2) They had not yet expired at that time. They are then deemed, as between the parties to the Statute, to be acceptances of the jurisdiction of the new Court for the unexpired period and in accordance with their terms under paragraph 5 of Article 36." (*Ibid*., at p. 52.)

Next, he applied these requirements to Nicaragua:

> "Nor are they met in the case of Nicaragua. For though this State is a party to the Statute [of the International Court of Justice] and though it had recognized the jurisdiction of the Permanent Court unconditionally and without any time limit, *its declaration did not become effective because only States parties to the Protocol of Signature of the Statute of the Permanent Court were in a position to make valid declarations*. Nicaragua, however, never deposited the instrument of ratification of the Protocol of Signature with the Secretariat of the League of Nations, as stipulated in paragraph 3 of the Protocol. It merely notified the League of Nations by a telegram dated November 29, 1939, that it had ratified the Protocol and that the instrument of ratification was to follow. The instrument did not follow." (*Ibid*., at p. 53 (footnotes omitted).)

Professor Engel was well aware of the way Nicaragua had been listed in the Court's *Yearbook* and by Judge Hudson (*ibid*., at p. 53, n. 56), thus emphasizing all the more that he had actually analysed the question before arriving at his conclusion. (Compare Nicaraguan Memorial, para. 69.)

(b) *Judge Manley Hudson*

139. Reference has already been made to the fact that Judge Hudson closely scrutinized Nicaragua's status in 1955, and concluded that Nicaragua "is not bound by the second paragraph of Article 36 of the Statute of the International Court of Justice" (para. 115, *supra*). Why, then, did Judge Hudson include Nicaragua among the States subject to Article 36 (5) in his earlier writings? (See, e.g., M. Hudson, "The Twenty-Fourth Year of the World Court", 40 *American Journal of International Law*, p. 1, at p. 34 (1946).)

140. From all available evidence, it would appear that Judge Hudson initially regarded Nicaragua's 1939 telegram as an effective ratification of the Protocol

of Signature of the Statute of the Permanent Court[1]. He never, however, suggested that, if the telegram had not constituted ratification, Nicaragua might nevertheless be bound by operation of Article 36 (5)[2]. Over time, and upon close examination, Judge Hudson recognized that Nicaragua's 1939 telegram had not been a satisfactory means of expressing its consent, and therefore that Nicaragua could not be deemed to be bound under Article 36 (5).

141. After Honduras retained Judge Hudson in 1955, he sent a preliminary memorandum to Foreign Minister Mendoza of Honduras (Ann. 38). At this point Judge Hudson already had serious doubts about the listing of Nicaragua's declaration. Judge Hudson stated:

> "Of course, Nicaragua should have sent a ratification of the Protocol and the Statute of the Court. I can't find that they did so.
>
> . . . .
>
> *A telegraph by Nicaragua would not be a way for them to add to the legal consequences of the action of 1929*
>
> . . . .
>
> However, on 26 June 1945, *Nicaragua signed the Charter of the United Nations, and ratified it* on 6 September 1945; it became effective on 24 October 1945. *This did not, in any way, affect the compulsory jurisdiction.*" (Italics added.)

Judge Hudson's correspondence with the Registrar of the Court followed (see para. 114, *supra*).

142. In his legal opinion for Honduras in December 1955 Judge Hudson again emphasized his increasing doubts about the telegram:

> "19. It would seem that more emphatic action than sending a telegram should be taken to make Nicaragua a Party to the Statute of the Permanent Court of International Justice. It would be capable of becoming a Party to the second paragraph of Article 36 of the original Court Statute, only if it were a Party to the Statute as a whole. Nicaragua seems to have been conscious of this, for it is to be noted that she mentioned that a ratification would follow. At any rate, no ratification had been received at the Secretariat of the League of Nations by the end of 1945. Nicaragua must, in this respect, have changed her mind. At any rate, we can only act on what she did.
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> 20. It is admitted that at the time of Nicaragua's action in 1939 — on 29 November 1939 — a large part of the world was engaged in, or on the eve of, a world war. Yet, this would not excuse Nicaragua's failure to formalize its action.
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[1] Although Judge Hudson was notified by the League of Nations in 1942 that no instrument of ratification had been received (see Ann. 25), he listed Nicaragua in his 1943 treatise as having a declaration in force as of 1939. (See Hudson, *The Permanent Court*, at p. 667.)

[2] The listing of Nicaragua in Hudson's 1946 article is expressly based on the premise that Nicaragua had been a party to the Statute of the Permanent Court (*op. cit.*, at pp. 51-52).

> 23. It would seem that under the Statute of the International Court of Justice, the Secretary General of the United Nations has a larger power than he had under the Statute of the Permanent Court of International Justice; but the ratification of the declaration seemed necessary to the men who guided the Permanent Court of International Justice. They required the declaration, and it seems to have been understood at all times that it required a ratification which would pass anyone's muster." (Ann. 37, paras. 19, 20, 23.)

Judge Hudson ends this part of the discussion by quoting a letter from M. Giraud, Acting Legal Adviser of the League of Nations (Ann. 25), who had concluded that Nicaragua was not bound either by the Protocol of Signature or by the Optional Clause (*ibid.*, at para. 25). Judge Hudson concluded that "Nicaragua . . . is not bound by the second paragraph of Article 36 of the Statute of the International Court of Justice" (*ibid.*, at para. 36).

143. In 1957, Judge Hudson published his last annual article on the International Court. He continued to include Nicaragua on the list of States party to the compulsory jurisdiction of the Court (perhaps in deference to his client, Honduras), but introduced a new and cryptic footnote to Nicaragua's listing: "See the relevant correspondence." (M. Hudson, "The Thirty-Fifth Year of the World Court", 51 *American Journal of International Law*, p. 1, at p. 17 (1957).) Although he did not explain himself further, one can surmise that he had in mind not only Nicaragua's correspondence with the League but also his own recent correspondence with the Court Registry and League Archives.

(c) *Professor Shabtai Rosenne*

144. Professor Rosenne's writings show an increasing concern that Nicaragua's declaration might never have been in force. In 1957, relying on the *I.C.J. Yearbook 1946-1947*, Professor Rosenne implicitly viewed Nicaragua as having had a declaration in force prior to 1946 (*The International Court of Justice*, p. 310 (1957)). By 1960, however, in a more detailed analysis of the declarations, Professor Rosenne had added a footnote to his inclusion of Nicaragua:

> "*There exists doubt whether this instrument was ratified.* The U.N. Secretariat includes it in the list of multilateral conventions of which the Secretary-General acts as Depository. Doc. ST/LEG/3, p. I-24. *This is doubted by the Registry of the Court*, I.C.J. Yearbook, 1957-8, p. 205. And see Hudson, *The Permanent Court of International Justice 1920-1942*, p. 696. In the *Arbitral Award of 23 December 1906* case (pending), Honduras invoked *inter alia* the Nicaraguan declaration." (*The Time Factor in the Jurisdiction of the International Court of Justice*, p. 19 (1960) (hereafter "*The Time Factor*") (italics added).)

He also stresses in this work that in order for declarations to be transferred by Article 36 (5) they were "subject to the overriding condition that the State concerned was a party to the Protocol of Signature of the Statute of the Permanent Court . . ." (*ibid.*, at p. 19).

145. Professor Rosenne's subsequent works also evidence increasing doubts

about the reliability of Nicaragua's listing[1]. Thus, although he never published an authoritative analysis of Nicaragua's status[2], he progressively qualified his inclusion of Nicaragua in his published works. Like Professor Engel and Judge Hudson, Professor Rosenne gives no support to Nicaragua's theory that Article 36 (5) might apply to a declaration which had not entered into force for the Permanent Court[3].

4. Publications of the United States Government

146. In a section entitled "Practice of the United States", Nicaragua has cited a variety of United States Government publications since 1946 which have listed Nicaragua among the States accepting the Court's compulsory jurisdiction (Memorial, paras. 79-83). Of these publications — none of which represents "practice" of the United States, as that term is customarily used — Nicaragua places primary reliance on *Treaties in Force*, an annual publication by the State Department of bilateral and multilateral treaties to which the United States is party. In the case of multilateral agreements for which the United States is not depository, *Treaties in Force* relies entirely upon information furnished by the depository, in this case the Secretary-General of the United Nations. *Treaties in Force* should not be considered authoritative or admissible evidence of the text or parties to a multilateral treaty for which the United States is not depository; that role is reserved for other publications, none of which has ever listed States accepting this Court's compulsory jurisdiction[4].

147. The same may be said for the other United States publications cited by Nicaragua. Most derive from *Documents and State Papers*, an early State Department publication which listed Nicaragua's declaration as effective from

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[1] In *The World Court*, p. 96, n. 21 (1962), Professor Rosenne listed Nicaragua among States with declarations "made in relation to the Permanent Court . . . *believed* to be in force" (italics added). The 1973 edition changed this to read "still *recorded* as in force", p. 233 (italics added). In *The Law and Practice of the Court*, Vol. II, App. 10, p. 899 (1965) (hereafter "*Law and Practice of the Court*"), he states, in a footnote to the Nicaragua entry:

> "A ratification said to have been made on 29 November 1939 is not notified in the League of Nations *Treaty Series*. See Yearbook, 1946-7, p. 210. In the 21st List of Signatures, Ratifications and Accessions in respect of Agreements and Conventions concluded under the auspices of the League of Nations, it is stated that Nicaragua's signature of the Optional Clause is 'not yet perfected [by] ratification'. (*LNOJ, Sp. Sup.*, No. 193, p. 43.)"

[2] See, e.g., Rosenne, *Law and Practice of the Court*, at App. 10, p. 880 ("Inclusion or exclusion of any declaration in this Appendix is not to be considered as an expression of the author's views of any question connected with the status of that declaration"). It is notable in this regard that his works reflect an increasing tendency to refer back to the original League materials with respect to Nicaragua's declaration, rather than reference to the Court's *Yearbook*.

[3] Moreover, as Agent for Israel in the *Aerial Incident* case, Professor Rosenne never suggested this theory. Instead, he assumed that only declarations that had been binding acceptances of the compulsory jurisdiction of the Permanent Court could be deemed acceptances of the compulsory jurisdiction of the International Court of Justice under Article 36 (5). (*I.C.J. Pleadings, Aerial Incident of 27 July 1955*, p. 455, at pp. 460, 463, 471, 473, 474, 477, 483, 485 (oral statement of Mr. Rosenne).)

[4] Pursuant to 1 United States Code, Sections 112a and 13, the authoritative publications are *Treaties and Other International Agreements ("TIAS")* and *United States Treaties and Other International Agreements ("UST")*.

29 November 1939 but which pointed out the footnote in the *I.C.J. Yearbook 1946-1947* and added: "General index No. 9 of the League of Nations Treaty Series does not record deposit of the ratification, which had not been received in the Registry of the Court." (Vol. I, No. 3 (June 1948).) Subsequent publications, which were concerned with updating earlier listings by listing new or renewed declarations, omitted these references[1].

148. In short, none of these publications purports to be authoritative, and none endorses Nicaragua's theory of Article 36 (5).

5. *Publications of Nicaragua*

149. The United States is as yet unaware of any Nicaraguan official publications antedating this case which list, or have previously listed, Nicaragua's declaration as in force. Nor is the United States aware of any official statements made prior to this case by the Government of Nicaragua during the 55 years since it signed its 1929 declaration that would indicate in any way that Nicaragua itself believed the 1929 declaration to be legally binding.

6. *Conclusion*

150. In sum, although Nicaragua's declaration never came into force for the Permanent Court, Nicaragua suggests that the declaration nevertheless was "still in force" within the meaning of Article 36 (5) or brought into force by that Article when Nicaragua ratified the United Nations Charter. Although the record does reveal a degree of confusion or ignorance concerning Nicaragua's failure to become party to the Statute of the Permanent Court, there is absolutely no support for Nicaragua's novel construction of Article 36 (5).

151. Nicaragua's novel interpretation is not only unsupported by the text of the Article, but contrary to the plain meaning of the words, "still in force"; not only unsupported by the negotiating history of the Conference, but contradicted by those *travaux* and by the statements of persons present at the Conference, such as Krylov, Fahy, Hackworth and Hudson; not only unsupported by examples of other States, but inconsistent with the treatment accorded the other declarations which were not in force for the Permanent Court and, in particular, contradicted by the examples of Costa Rica and Turkey; not only unsupported by any decision of this Court, but contradicted by both majority and dissenting opinions in the *Aerial Incidents*, *Temple of Preah Vihear* and *Barcelona Traction* cases; not only unsupported by the Court's *Yearbook* and any other publication, but expressly contradicted by that *Yearbook* and by the Registrar of the Court; not only unsupported by any publicist, but contradicted by Krylov, Hudson, Engel and Rosenne; not only unsupported by the conduct of the Parties, but contradicted by United States Department of State and United States Senate statements made during consideration of the Charter and by Nicaragua's own conduct and statements prior to the *King of Spain Arbitral Award* case. All these authorities agree: Article 36 (5) applies only to declarations that were in force for the Permanent Court at the time the declarant joined the United Nations. Article 36 (5), therefore, cannot apply to Nicaragua's declaration of 1929.

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[1] See, e.g., *Department of State Bulletin*, Vol. 24, No. 616 (23 April 1951).

Section III. The Conduct of the Parties Cannot, and Did not, Create an Acceptance by Nicaragua of the Compulsory Jurisdiction of the International Court of Justice

A. A State May not Manifest Its Consent to Accept the Compulsory Jurisdiction of this Court Except in Conformity with the Mandatory Legal Requirements of this Court's Statute

152. In its Memorial, Nicaragua claims that the conduct of the Parties since 1946 "provides a second and independent basis for the effectiveness" of its 1929 declaration (para. 84). Nicaragua's argument appears to be, first, that Nicaragua's conduct created an implied consent that overcame its failure to accept the compulsory jurisdiction of the Permanent Court, and, second, that United States conduct constituted acquiescence in the effectiveness of this implied consent. The argument is an attempt to circumvent the Statute of this Court. It assumes, correctly, that Nicaragua has not consented to compulsory jurisdiction in accordance with the provisions of Article 36 of the present Statute. Nicaragua asserts incorrectly that the conduct of the Parties *nevertheless* has bound Nicaragua to this Court's compulsory jurisdiction.

153. The consequences of accepting the Court's compulsory jurisdiction are far too significant, and the requirements of law are far too rigorous, to allow this casual approach. Indeed, even the authority upon which Nicaragua relies, the *Temple of Preah Vihear* case, recognizes that, where "the law prescribes as mandatory certain formalities", these formalities "become essential for the validity" of the transactions (*Temple of Preah Vihear, Preliminary Objections, Judgment, I.C.J. Reports 1961*, p. 17, at p. 31).

154. The Statute of the International Court of Justice provides three means by which a State may manifest its consent to accept the jurisdiction of the Court: under Article 36 (2) and (4), by filing a declaration with the Secretary-General of the United Nations; under Article 36 (5), by having a declaration that was in force under the Permanent Court system and remained in force when the Statute of this Court came into force; or by treaty or convention under Article 36 (1) or Article 37. The conduct of the Parties, even if Nicaragua's characterizations were accurate, cannot satisfy the mandatory legal requirements of any of these Articles.

155. The *Temple of Preah Vihear* case identified the essential requirement for declarations under Article 36 (2) of this Court's Statute:

> "The only formality required is the deposit of the acceptance with the Secretary-General of the United Nations under paragraph 4 of Article 36 of the Statute." (*I.C.J. Reports 1961*, at p. 31.)

It was only because Thailand had complied with this requirement that this Court held that there was no "defect . . . so fundamental that it vitiated the instrument by failing to conform to some mandatory legal requirement" (*ibid.*, at p. 34). Nicaragua does not contend that it has filed such a declaration[1]. Thus, the conduct of the Parties is irrelevant so far as Article 36 (2) is concerned.

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[1] A footnote in the Nicaraguan Memorial implies that the American Treaty on Pacific Settlement (the "Pact of Bogotá") functions as a declaration under Article 36 (2) (para. 93, n. 2). Nicaragua has not actually invoked the Pact as a title of jurisdiction, and, in any event, such an assertion would be incorrect. The United States reserves all rights to object should this become an issue in the present proceeding. Nevertheless, for the Court's benefit, the United States sets forth in Annex 39 to this Counter-Memorial a brief description of the Pact of Bogotá. The Pact of Bogotá is entirely irrelevant to this proceeding since it expressly applies only to parties to the Pact, and the United States is not a party.

156. The conduct alleged by Nicaragua is also irrelevant to Article 36 (5). Although Nicaragua's 1929 declaration was never in force for the Permanent Court, Nicaragua seems to claim that its declaration became effective as a result of the Parties' conduct *after the Permanent Court ceased to exist* (Memorial, para. 85 ("conduct . . . over the past 38 years")). This might be called the "time-machine" theory of consent because it assumes that later conduct can remake earlier events. But, under Article 36 (5), a declaration under the Statute of the Permanent Court either transferred on the date the declarant became party to the United Nations Charter, or not at all (*Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria), Judgment, I.C.J. Reports 1959*, p. 127, at p. 143). When Nicaragua joined the United Nations in 1945 its declaration could not have been considered in force for the Permanent Court as a result of conduct which had not yet even occurred.

157. Even apart from the problem of chronology, the conduct alleged by Nicaragua could not correct the failure to satisfy the mandatory legal requirement of the Permanent Court's Protocol of Signature, the deposit of the instrument of ratification. Nicaragua's assertion that "consent can readily be perfected by other means" (Memorial, para. 88, is simply incorrect, see paras. 34-35, *supra*). The concept of "essential validity" on which Nicaragua relies is irrelevant to the question of whether a treaty such as the Protocol of Signature entered into force for Nicaragua[1].

158. Finally, Nicaragua does not attempt to relate the "conduct of the parties" to Article 36 (1). Nor could Nicaragua possibly claim that the conduct of the parties created a special agreement to submit this case to the Court. The United States did not agree to jurisdiction prior to the proceedings and has contested jurisdiction since the Application was filed.

159. In short, the conduct of the parties alleged by Nicaragua is altogether irrelevant to the mandatory legal requirements of any of the pertinent sections of the Statute of this Court and therefore cannot provide a basis for jurisdiction.

B. Nicaragua's Conduct Does not Indicate any Intent to Accept the Compulsory Jurisdiction of this Court

160. The Parties agree that Nicaragua failed to take the steps necessary to accept the compulsory jurisdiction of the Permanent Court. Nor does Nicaraguan "conduct" during the past 38 years suggest any intent to accept the compulsory jurisdiction of the present Court. Nicaragua claims that its participation in the San Francisco Conference, the *King of Spain Arbitral Award* case, and its silence in the face of the Court *Yearbook* listings manifest its consent to accept the

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[1] See Nicaraguan Memorial, para. 87. "Essential validity", or "invalidity", as the concept is expressed in the Vienna Convention on the Law of Treaties, Articles 46-53, concerns error, fraud and other issues relating to the intrinsic legality of treaties. "Formal validity" concerns the conclusion and entry into force of treaties and depends heavily on matters of form, including the formalities of ratification. Questions of essential validity do not arise unless the requirements of formal validity have been satisfied:

> "Essential validity . . . is a term used to describe that intrinsic or inherent validity which a treaty must possess, in addition to its formal validity (regularity of conclusion) and its temporal validity (continuing existence and non-termination), in order to have full obligatory force and give rise to international obligations. Accordingly, the question of essential validity presumes the existence of an instrument regularly concluded as to form, and having entered into force . . ." ("Law of Treaties", Report by G. G. Fitzmaurice, Special Rapporteur, 1958 *Yearbook of the International Law Commission*, Vol. II, p. 20, at p. 23.)

Court's compulsory jurisdiction (Memorial, paras. 91-92). The evidence does not support, indeed, it contradicts, such an assertion.

161. Many States participated in the San Francisco Conference and voted in favor of the Statute, yet did not themselves accept this Court's compulsory jurisdiction. As Professor Brownlie has written:

> "States do not submit to the jurisdiction of the Court as a result of signing the Statute, and some further expression of consent is required." (*Principles of Public International Law* 718 (3rd ed. 1979).)

By approving Article 36 (5), Nicaragua agreed that only declarations in force under the Permanent Court should be deemed in force for the new Statute. In San Francisco, Nicaragua was one of the States that specifically opposed universal compulsory jurisdiction (*Summary Report of Seventeenth Meeting of Committee IV/1, UNCIO*, Vol. 13, p. 246, at p. 250). As Nicaragua was aware at the time, given the correspondence and discussions in 1935, 1939, 1942 and 1943, that its own declaration was not in force, its preference for Article 36 (5) over universal compulsory jurisdiction indicates an understanding that it would *not* be bound without the deposit of a new declaration.

162. As discussed above, the history of the *King of Spain Arbitral Award* case reveals that Nicaragua believed its declaration under the Permanent Court not to be in force for this Court, that Nicaragua so informed the United States, and that a special *compromis* was required precisely because Nicaragua's declaration was not in force (see paras. 113-120, *supra*). Nicaragua's conduct as potential respondent in that dispute now estops Nicaragua, as Applicant in this dispute, from adopting the contrary position as to the effectiveness of its declaration.

163. Finally, Nicaragua's failure to object to the *I.C.J. Yearbook*'s listing of its declaration with a conspicuous disclaimer can only be regarded as acquiescence by Nicaragua in the representation that it had not, or may have not, accepted the Court's compulsory jurisdiction. Nicaragua agrees that it would be "difficult to ignore" such a "prominent" footnote (**I**, p. 124). Certainly any State with reason to be concerned about Nicaragua's status would be made aware by the footnote that Nicaragua's declaration may not have entered into force. It was Nicaragua's burden to correct the problem; it was not the responsibility of other States. Nicaragua could easily have filed a new declaration or protested the footnote if there was reason to. It did neither. This indicates a desire not to be bound or, at most, a desire to preserve a degree of ambiguity and confusion[1].

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[1] Even if there had been no footnote to alert readers to the failure to bring the declaration into force, the listing in the Court's *Yearbook* could not be taken as evidence of consent to accept compulsory jurisdiction. Such silence concerning the listing could only be pertinent if the situation required some response from the State in order to avoid a change in the State's legal position. (*Temple of Preah Vihear, Merits, Judgment I.C.J. Reports 1962*, p. 6, at p. 23 ("the circumstances were such as called for some reaction"); I. C. MacGibbon, "The Scope of Acquiescence in International Law", 31 *British Year Book of International Law* (1954), p. 143, at p. 182 ("Acquiescence is equivalent to tacit or implied consent. It takes the form of silence or absence of protest in circumstances which, according to the practice of States and the weight of authority, demand a positive reaction in order to preserve a right").) In this case, the listing in the *I.C.J. Yearbook* could not prejudice or bind Nicaragua since the question of jurisdiction is always for the Court to decide in accordance with the Statute. As this Court has stated:

> "where the contentions of the parties disclose a 'dispute as to whether the Court has jurisdiction', in accordance with Article 36, paragraph 6, of the Statute, 'the matter shall be settled by the decision of the Court', that is to say by a judicial decision stating the reasons on which it is based and rendered after fully hearing the parties . . ." (Order of 10 May 1984, *I.C.J. Reports 1984*, p. 178, para. 21).

After allowing this situation to persist, Nicaragua is now estopped from asserting that its declaration became binding.

C. United States Conduct Cannot Create an Acceptance by Nicaragua of this Court's Compulsory Jurisdiction

164. The law of acquiescence provides that, under certain conditions, State A may be bound by *its own* inaction or failure to protest if the circumstances demanded that State A respond to protect *its own* rights. But State A's inaction can never prejudice or compromise the rights, or create obligations for, State B. United States silence about listings in the *I.C.J. Yearbook* or elsewhere could not possibly create an acceptance by Nicaragua of the compulsory jurisdiction of this Court.

165. Even if in theory the silence of one State could create obligations for another State, silence would only be relevant where the circumstances called for some reaction (see para. 163, n. 1, *supra*). The circumstances here — particularly the non-authoritative listing of Nicaragua's declaration in the *I.C.J. Yearbook* — did not call for any United States response. The listing concerned Nicaraguan, not United States, obligations. And the listing contained the famous footnote, which gave adequate notice of the defect. Nor was there any occasion for the United States to study the listing prior to the Nicaraguan Application in this case. Nothing, therefore, may be inferred from United States silence on the subject.

166. Finally, even if the law regarded all the other States that made no comment as having acquiesced in the effectiveness of Nicaragua's declaration, the United States could not be so regarded because Nicaragua had specifically represented to the United States in 1955 that it was not bound by its declaration (para. 116, *supra*). After having "disarmed" the United States in this fashion, Nicaragua is estopped from pleading that the United States conduct constitutes acquiescence or has created an obligation for Nicaragua that otherwise did not exist.

CHAPTER II

THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION PROVIDES NO BASIS FOR JURISDICTION IN THIS CASE

167. In its Memorial, Nicaragua for the first time asserts that the 1956 Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States (hereafter the "FCN Treaty"[1]) "constitutes a complementary foundation for the jurisdiction of the Court in compliance with Article 36 (1) of the Statute of the Court in so far as the Application of Nicaragua implicates violations of provisions of the Treaty" (para. 164). Nicaragua made no reference to the FCN Treaty as a basis for jurisdiction either in its Application or in the preliminary measures proceedings. Nor did Nicaragua assert anywhere in its Application claims arising under the FCN Treaty. Nicaragua's invocation of the Treaty at this late date as the basis for both jurisdiction and substantive claims is frivolous and is barred by the rules and practice of the Court.

168. The FCN Treaty cannot, moreover, provide a basis for the Court's jurisdiction in these proceedings because on its face it is irrelevant to the claims asserted in Nicaragua's Application. Further, even if Nicaragua's Application arguably implicated the FCN Treaty, Nicaragua could not now rely upon the Treaty as a title of jurisdiction. The FCN Treaty expressly requires exhaustion of possible diplomatic settlements as a precondition to invocation of the FCN Treaty's compromissory clause, and Nicaragua has never even raised any of the allegations it now makes under the Treaty in diplomatic discussions with the United States.

Section I. Having Failed Previously to Identify the FCN Treaty as a Basis for Jurisdiction, Nicaragua May not now Invoke that Treaty

169. In its Application, Nicaragua alleged that the Court has jurisdiction on the basis of Article 36 of the Statute of the Court (Introduction, para. 13). In its letter to the Court of 24 April 1984, Nicaragua asserted that there were also treaties that provided the Court with jurisdiction over Nicaragua's Application. As the Court observed, however, Nicaragua failed to identify any such treaties (Order of 10 May 1984, *I.C.J. Reports 1984*, p. 175, para. 14). The FCN Treaty is mentioned for the first time in the Nicaraguan Memorial (paras. 163 *et seq.*).

170. In proceedings instituted by means of an Application pursuant to Article 40 of the Statute of the Court, the jurisdiction of the Court is founded upon the legal grounds specified in that Application. Article 38 of the Court's Rules explicitly requires that the Application "specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based". An applicant is not permitted to assert in subsequent pleadings jurisdictional grounds of which it was presumably aware at the time it filed its Application.

171. Thus, in the case of *Certain Norwegian Loans*, the Court refused to

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[1] Signed at Managua 21 January 1956; entered into force 24 May 1958 (9 *UST* 449; *TIAS* 4024; 367 *UNTS* 3). A copy of the full text of the FCN Treaty is appended as Ann. 40.

consider as bases for jurisdiction two treaties identified during proceedings on preliminary objections but not identified in the Application (*Judgment, I.C.J. Reports 1957*, p. 9, at pp. 24-25). Just as in *Certain Norwegian Loans*, the Court in this proceeding cannot allow a party to base jurisdiction on an instrument different from that set out in the Application[1].

172. Nicaragua purported in its Application (para. 26) to reserve the right to amend that Application at some future time and invokes that reservation now as the basis for adding the FCN Treaty to its pleadings (Nicaraguan Memorial, para. 164, n. 3). This purported reservation cannot alter the requirements of the Statute and the Rules. As the Court noted in the *Barcelona Traction* case, a jurisdictional defect in the original application can be remedied by voluntarily withdrawing the defective application and filing a new one (*Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6, at p. 19). Failure to identify a basis for the Court's jurisdiction is such a defect. Withdrawal can be accomplished unilaterally before the respondent has filed responsive pleadings. Once the respondent has made such a response, however, withdrawal requires the consent of the respondent (*ibid.*, p. 20).

Section II. The FCN Treaty Is wholly Irrelevant to the Dispute that Is the Subject of Nicaragua's Application

173. Nicaragua admits that, if the Court were to find jurisdiction under the FCN Treaty but not under Article 36 (2) and (5) of the Statute of this Court, the only issues properly before the Court would be alleged violations of the FCN Treaty itself (Memorial, para. 164). But Nicaragua's Application presents no claims of any such violations. Thus, if the basis for the Court's jurisdiction is limited to the FCN Treaty, there are no claims properly before the Court for adjudication. Indeed, Nicaragua's failure to cite the FCN Treaty in its Application as the basis for its claims is persuasive evidence that it, too, considers the Treaty irrelevant to this case.

174. Nor may any of the claims set forth in the Application be construed as arising under the FCN Treaty. As this Court held in the *Ambatielos* case, "it is not enough for the claimant Government to establish a remote connection between the facts of the claim and the Treaty" upon whose compromissory clause it relies (*Ambatielos, Merits, Judgment, I.C.J. Reports 1953*, p. 10, at p. 18). In order to establish the Court's jurisdiction over the present dispute under the FCN Treaty, Nicaragua must establish a reasonable connection between the FCN Treaty and its claims. Nicaragua cannot establish such a connection.

175. The purpose and scope of FCN treaties was well summarized by Herman Walker:

> "[FCN] treaties are not political in character. Rather, they are fundamentally economic and legal. Moreover, though 'commerce' and 'navigation' complete the title and accurately describe part of their content, their concern nowadays is only secondarily with foreign trade and shipping. They are 'commercial' in the broadest sense of that term; and they are above-all treaties of 'establishment', concerned with the protection of persons, natural and

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[1] See also *Prince von Pless Administration, Order of 4 February 1933, P.C.I.J., Series A/B, No. 52*, p. 11, at p. 14 ("under . . . the Statute, it is the Application which sets out the subject of the dispute, and the Case, though it may elucidate the terms of the application, must not go beyond the limits of the claim as set out therein . . .").

> juridical, and of the property and interests of such persons. They define the treatment each country owes the nationals of the other; their rights to engage in business and other activities within the boundaries of the former; and the respect due them, their property and their enterprises." ("Modern Treaties of Friendship, Commerce and Navigation", 42 *Minnesota Law Review*, p. 805, at p. 806 (1958)[1].)

176. The United States invites the Court to read the FCN Treaty (Ann. 40) as the surest confirmation of its commercial character. The FCN Treaty deals with such topics as the right of nationals of one party to direct enterprises in the territory of the other party (Art. II (1)); consular representation if nationals of one party are arrested in the territory of the other party (Art. III (2)); national treatment for nationals of one party in the territory of the other with respect to laws providing compensation on account of injury, disease, or death arising out of employment (Art. IV (2)); etc. There is simply no relationship between these wholly commercial provisions and Nicaragua's allegations in its Application, which focus exclusively on purportedly unlawful uses of armed force.

177. Nicaragua asserts that alleged military and paramilitary activities of the United States directly violate Articles I, XIV (2), XVII (3), XIX (1) and (3) and XX of the Treaty (Memorial, paras. 163-172). Nicaragua, in fact, discusses in its Memorial only Article XIX, paragraph (1) of which provides: "Between the territories of the two Parties, there shall be freedom of commerce and navigation." (Para. 165.) As is apparent from reading Article XIX in its entirety, paragraph 1 merely serves to introduce and summarize the more specific provisions contained in the remaining paragraphs of the Article. Essentially, these provisions apply to the treatment of vessels of one party within the territorial waters of the other party. They provide specifically that: vessels under the flag of the other party shall be deemed to be vessels of that party (para. 2); national and most-favoured-nation treatment shall be accorded each party's vessels within the other party's ports and waters, particularly with respect to customs duties (paras. 3 and 4); and assistance will be provided to vessels in case of distress (para. 5). Paragraph 6 provides definitions for the preceding provisions. The obligations thereby created for the United States pertain to treatment of Nicaraguan vessels in United States waters. These commercial navigation provisions have nothing to do with Nicaragua's claims that the United States is unlawfully using force against Nicaragua[2].

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[1] Walker was speaking of 16 FCN treaties concluded by the United States after World War II, including that with Nicaragua. The secondary literature on FCN treaties endorses Walker's view that such treaties are "not political" but are fundamentally "economic and legal". See, e.g., Wilson, *U.S. Commercial Treaties and International Law*, *passim* (1960). See also, *Committee on Foreign Relations, Rept. No. 9, Commercial Treaties with Iran, Nicaragua and The Netherlands*, U.S. Senate, 84 Cong., 2d Sess., July 9, 1956, p. 1. The Report is appended as Ann. 41.

[2] The purpose, history, and intent of the provisions of Article XIX and like provisions of other United States FCN treaties are exhaustively examined in D. Piper, "Navigation Provisions in United States Commercial Treaties", 11 *American Journal of Comparative Law*, p. 184 (1962). Piper nowhere suggests that anyone has ever considered these commercial navigation provisions to encompass political claims, such as those made by Nicaragua here, relating to an alleged unlawful use of armed force. The decision in *Oscar Chinn, Judgment, 1934, P.C.I.J., Series A/B, No. 63*, p. 65, at p. 84, relied upon by Nicaragua (Memorial, para. 168) is not to the contrary. The "trade" under consideration there involved the transport of goods within a single, defined geographical area in Africa, the Congo Basin. Each of the European States party to that treaty agreed to commercial equality and freedom of trade with respect to the nationals of the other States *within the Congo Basin* (*ibid.*, p. 79).

178. Nicaragua purports to reserve the right to explain later the relevance of the other provisions of the FCN Treaty that it cites in passing, namely Articles I, XIV (2), XVII (3), and XX (Memorial, para. 173). On the face of the Articles themselves, however, their irrelevance to Nicaragua's claims is manifest. All, like Article XIX (1), relate to the treatment of the nationals of one party, or goods or property belonging to those nationals, in the territory of the other party. Thus, Articles XIV and XV also address the treatment of vessels of one party within the territory of the other. Paragraph 3 of Article XVII provides that neither party will impose "any measure of a discriminatory nature" to hinder importers or exporters from obtaining marine insurance on products from the other party. And Article XX establishes the right of nationals of one party to free transit through the territory of the other party. Article I is merely a statement of the general principle that each party will accord "equitable treatment" to the interests of nationals and companies of the other party — a principle in the light of which the following operative provisions are to be read.

179. Any possible doubts as to the applicability of the FCN Treaty to Nicaragua's claims is dispelled by Article XXI of the Treaty, paragraph (1) of which provides:

> "The present Treaty shall not preclude the application of measures: . . . *(d)* necessary to fulfil the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests . . ." (Ann. 40, at p. 17.)

Article XXI (1) *(c)*, moreover, excludes from the FCN Treaty's coverage measures regulating the traffic in arms or other materials carried on directly or indirectly for the purpose of supplying a military establishment. Article XXI has been described by the Senate Foreign Relations Committee as containing "the usual exceptions relating . . . to traffic in arms, ammunition and implements of war and to measures for collective or individual self-defense" (*Sen. Executive Rept. No. 9*, Ann. 41, at p. 4[1]).

Section III. Nicaragua May not Invoke the Compromissory Clause of the FCN Treaty Because It Has Made no Effort to Resolve by Diplomacy any Disputes under the FCN Treaty

180. Any claim based upon the FCN Treaty must, in any event, be dismissed as inadmissible at this time. Article XXIV of the Treaty provides:

> "1. Each Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other Party may make with respect to any matter affecting the operation of the present Treaty.
> 2. *Any dispute between the Parties* as to the interpretation or application of the present Treaty, *not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice*, unless the Parties agree to settlement by some other pacific means." (Italics added.)

An attempt to adjust a dispute "satisfactorily" by diplomacy is thus a prerequisite to submission of that dispute to the Court.

181. This Court has recognized that title to jurisdiction may specify prior

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[1] Article XXI includes provisions standard in all FCN treaties (see Piper, *op. cit.*, at p. 93).

recourse to diplomatic negotiations as a precondition to the institution of proceedings. Indeed, when faced with treaties conferring jurisdiction in such circumstances, both the Permanent Court and this Court have ascertained whether a reasonable probability exists that further negotiations would lead to a settlement (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 13; *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319, at pp. 327, 335, 344-346).

182. Nicaragua does not allege that there have been negotiations to resolve any dispute under the FCN Treaty, or that such negotiations have led to a deadlock. Instead, Nicaragua baldly asserts that the alleged violations "quite obviously have not been satisfactorily adjusted by diplomacy" (Memorial, para. 165). But Nicaragua has never even raised in negotiations with the United States the application or interpretation of the FCN Treaty to any of the factual or legal allegations in its Application[1].

183. In sum, Nicaragua has invoked the FCN Treaty in its Memorial as an afterthought. The FCN Treaty has no relation to the jurisdictional or substantive claims in Nicaragua's Application. Nicaragua has failed to satisfy the FCN Treaty's own terms for invoking the compromissory clause. The rules and practice of this Court do not permit an applicant to change the entire basis for its Application in the middle of the proceedings. Nicaragua's FCN Treaty claims should, accordingly, be barred *in limine*.

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[1] Neither the Contadora Group discussions nor recent bilateral talks between the United States and Nicaragua in Manzanillo, Mexico, have identified or addressed any dispute under the FCN Treaty. In any event, these discussions constitute an on-going process that can hardly be characterized as deadlocked. See discussion in Part II, *supra*.

PART II. STATEMENT OF FACTS RELEVANT TO JURISDICTION AND ADMISSIBILITY

184. Parts III and IV of this Counter-Memorial set forth additional arguments with respect to jurisdiction and admissibility. In this Part, the United States provides that information essential to an understanding of certain of the arguments in Parts III and IV.

185. The United States will describe in Chapter I Nicaragua's aggression against its neighbors — aggression including both conventional attacks by regular military forces and the direct support of armed opposition groups within those neighboring States directed toward the violent overthrow of their Governments. The United States will describe the response of the neighbouring States to this aggression and the support that the United States has provided at their request.

186. The United States will describe in Chapter II the interrelated social, economic, political and security issues that underlie the region-wide problems of Central America. The United States will then explain how those problems have led to generalized conflict both among the States of Central America and between the Governments and armed groups within several of those States.

187. The United States will discuss in Chapter III the origins of armed opposition within Nicaragua itself. The United States will review the promises of democratic reform, in the name of which the new Government of Nicaragua took power in 1979 and on the basis of which it received wide international support. The United States will discuss the subsequent violation of these promises by the Sandinista Government, and the internal opposition to which those violations have given rise. This discussion will demonstrate that Nicaragua has fundamentally mischaracterized the origins and nature of the internal conflict now taking place in that country.

188. The origins and interrelationship of the various aspects of the conflict in Central America have induced the States of the region to choose multilateral rather than bilateral negotiations to seek a peaceful settlement of the dispute. The United States will review in Chapter IV the status of the Contadora dispute settlement process to which Nicaragua and the other Central American States have agreed. The United States will describe how the nature and causes of the dispute have been defined in that process, and will discuss the issues which the States of the region have agreed must be addressed to achieve a durable settlement. The ancillary bilateral negotiations in which the United States and Nicaragua are now engaged in support of the Contadora process will be noted. Chapter IV will further demonstrate how Nicaragua's unilateral efforts to obtain adjudication by this Court of selective aspects of the region-wide dispute now being addressed within the Contadora framework would adversely affect the prospects of that process.

CHAPTER I

NICARAGUA HAS ENGAGED IN ARMED ATTACKS ON ITS NEIGHBORS

Section I. Nicaragua Has Promoted and Supported Guerrilla Violence in Neighboring Countries

189. Nicaragua solemnly denies that it is engaged in armed attacks on its neighbors (Nicaraguan Memorial, para. 194). The current Nicaraguan Government, however, has for years provided guerrillas in neighboring countries — particularly in El Salvador — with arms, munitions, finance, logistics, training, safe havens, planning and command and control support.

190. Thus, in a May 1983 report, the Permanent Select Committee on Intelligence of the United States House of Representatives — a source in which Nicaragua places confidence in its arguments before this Court[1] — observed:

> "[T]he Committee believes that the intelligence available to it continues to support the following judgments with certainty:
>
> > A major portion of the arms and other material sent by Cuba and other communist countries to the Salvadoran insurgents transits Nicaragua with the permission and assistance of the Sandinistas.
> >
> > The Salvadoran insurgents rely on the use of sites in Nicaragua, some of which are located in Managua itself, for communications, command-and-control, and for the logistics to conduct their financial, material and propaganda activities.
> >
> > The Sandinista leadership sanctions and directly facilitates all of the above functions.
> >
> > Nicaragua provides a range of other support activities, including secure transit of insurgents to and from Cuba, and assistance to the insurgents in planning their activities in El Salvador.
> >
> > In addition, Nicaragua and Cuba have provided — and appear to continue providing — training to the Salvadoran insurgents.
>
> Cuban and Sandinista political support for the Salvadoran insurgents has been unequivocable [sic] for years. The Committee concludes that similarly strong military support has been the hidden complement of overt support." (Application, Exhibit V, Tab 10, p. 6.)

This opinion is shared by the authorities in the United States who have had access to intelligence information relating to Nicaragua's regional activities, regardless of their attitudes concerning United States policy in the region[2].

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[1] **I**, pp. 51-52, 53-54; Application, Ann. A ("Chronological Account of U.S. 'Covert Activities' in and against Nicaragua") (hereafter "Chronological Account").

[2] Shultz affidavit, Ann. 1, para. 3. These conclusions are reflected as well in sec. 109 *(a)* of Pub. Law 98-215, 97 Stat. 1475, 9 Dec. 1983, which contains a formal Congressional finding that:

> "(2) [the Nicaraguan government has provided] military support (including arms, training, and logistical, command and control, and communications facilities) to groups seeking to overthrow the Government of El Salvador and other Central American governments . . ." (Ann. 42.)

191. Working closely with Cuba, the Sandinistas began their support for guerrillas in other countries soon after their assumption of power in mid-1979[1]. By mid-1980, they were exporting large volumes of arms and other military material to the guerrillas in El Salvador, an activity that has continued to the present time.

192. Publicly available evidence shows a long-standing pattern of Nicaraguan participation in, and tolerance of, arms trafficking, provision of command and control facilities and logistics, training and other support directed at overthrowing the Salvadoran Government[2].

193. Former President of El Salvador Magana stated in late 1983:

> "While Managua draws the world's attention by claiming for the past two years that it is about to be invaded, they have not ceased for one moment to invade our country.
>
> There is only one point of departure for the armed subversion: Nicaragua[3]."

194. Similar views were expressed by President Duarte in his inaugural address less than three months ago:

> "With the aid of Marxist governments like Nicaragua, Cuba and the Soviet Union, an army has been trained and armed and has invaded our homeland. Its actions are directed from abroad. Armed with the most sophisticated weapons, the Marxist forces harass our Armed Forces and constantly carry out actions intended to destroy our economy, with the loss of countless human lives and the suffering of hundreds of thousands of Salvadorans[4]."

The Chairman of the Senate Select Committee on Intelligence has recently confirmed, on the basis of intelligence available to his Committee, that this judgment remains valid. (*Washington Post*, 10 Apr. 1984, p. A-20 (Ann. 43).) The Chairman of the House Permanent Select Committee on Intelligence has similarly acknowledged the continuing validity of these conclusions. (*Congressional Record*, 2 Aug. 1984, pp. H8268-H8269. Ann. 44. See also the *Report of the National Bipartisan Commission on Central America*, 10 Jan. 1984, pp. 26-27, 87, 91 and 93. Ann. 45.) Entire *Report* deposited by the United States pursuant to Article 50 (2) of the Rules of Court.

[1] The value of external support and bases was impressed on the Sandinista National Liberation Front (FSLN) during the revolution against Somoza. In 1978-1979, FSLN guerrillas, forming the largest military element of the revolution, operated openly out of Costa Rica and received major material, organizational and political support from Cuba.

[2] See, e.g., *Washington Post*, 19 June 1983, p. A-1, Ann. 46; *Washington Post*, 21 Sep. 1983, p. A-29, Ann. 47; *New York Times*, 28 July 1983, p. A-10, Ann. 48; *New York Times*, 11 Apr. 1984, p. A-1, and 12 July 1984, p. A-8, Ann. 49. A considerable amount of evidence has been published by the United States Government. See, e.g., United States Department of State, *Communist Interference in El Salvador*, Special Report No. 80, 23 Feb. 1981 (Ann. 50). See also supporting documents contained in United States Department of State, *Communist Interference in El Salvador, Documents Demonstrating Communist Support of the Salvadoran Insurgency*, 23 Feb. 1981, deposited by the United States pursuant to Art. 50 (2) of the Rules of Court. See also United States Departments of State and Defense, *Background Paper: Nicaragua's Military Build-up and Support for Central American Subversion*, 18 July 1984 (hereafter *Background Paper*), deposited by the United States pursuant to Art. 50 (2) of the Rules of Court.

[3] Interview, *ABC* magazine (Madrid), 22 Dec. 1983 (Ann. 51).

[4] Inaugural address of President José Napoleón Duarte, San Salvador, 1 June 1984, as transcribed in United States Government, Foreign Broadcast Information Service, *Daily*

195. The actions of the Nicaraguan-supported guerrillas have increasingly been aimed at destroying the economy and infrastructure of El Salvador[1]. Roads have been mined, bridges and power transmission facilities destroyed, and bombs emplaced in buses and other forms of public transportation. Despite extensive economic assistance from the United States and others designed to mitigate the effect on the Salvadoran economy[2], in the years since the outbreak of major fighting gross domestic product has dropped by 23 per cent in real terms, and by 30 per cent if considered on a *per capita* basis. Unemployment has climbed to over 30 per cent[3]. While specific attribution is impossible, it is unquestionable that much of this cost — and a large portion of the thousands of deaths which have taken place in the past four years — would not have been incurred but for the substantial support provided by and through Nicaragua to the Salvadoran guerrillas.

196. Although Nicaragua's greatest efforts have gone toward supporting Salvadoran guerrillas, it has also promoted violence in other Central American countries[4]. An official 1982 Costa Rican report described actions of sabotage and terrorism sponsored by Nicaragua in that country[5].

197. Nicaragua — working closely with Cuba — has also on at least one occasion trained and infiltrated guerrillas into remote areas of Honduras in an attempt to foment armed guerrilla warfare in that country[6]. Honduran territory has long been used for the clandestine conveyance of supplies to Salvadoran rebels[7].

Report, Latin America (hereafter *FBIS*), 4 June 1984, p. P-5 (Ann. 52). In a 27 July 1984 press conference, President Duarte stated further that:

> "we have a problem of aggression by a nation called Nicaragua against El Salvador . . . At this very minute they are using fishing boats as a disguise and are introducing weapons into El Salvador in boats at night".

(Press conference, San Salvador, 27 July 1984, as transcribed in *FBIS*, 30 July 1984, p. P-2 (Ann. 53).)

[1] Radio Venceremos (clandestine station of the Farabundo Martí Liberation Front (FMLN)), 25 June 1984, 24 July 1984, 3 Aug. 1984, 7 Aug. 1984, as transcribed in *FBIS*, 26 June 1984, 25 July 1984, 8 Aug. 1984, 9 Aug. 1984 (Ann. 54).

[2] The great bulk of United States assistance to El Salvador since 1979 has been economic rather than military in nature. Total economic assistance since 1979 has been over $600 million; security assistance since that time totals some $200 million. United States Department of State, *Congressional Presentation, Security Assistance Programs*, Fiscal Years 1981 through 1985, submissions concerning Costa Rica, El Salvador, Honduras (Ann. 55). Development Assistance, PL-480 (food aid) and ESF (Economic Support Funds) are generally considered economic assistance; MAP (Military Assistance Program), FMS (Foreign Military Sales), and IMET (International Military Education and Training) are considered military and security assistance.

[3] United States Department of State, *El Salvador: Revolution or Reform?*, Current Policy No. 546, Feb. 1984, p. 3 (Ann. 56).

[4] Examples of its actions are described in Anns. 46 through 50. See also *Background Paper*.

[5] Costa Rican Ministry of Foreign Relations and Worship, *Las Relaciones entre Costa Rica y Nicaragua (Relations between Costa Rica and Nicaragua)*, 28 July 1982 (attachments not provided) (English translation provided) (Ann. 57).

[6] *Washington Post*, 22 Nov. 1983, p. A-1 (Ann. 58).

[7] See Ann. 49. See also Address by Honduran Ambassador to the Permanent Council of the Organization of American States (OAS), 14 July 1983, as transcribed in *FBIS*, 20 July 1983, p. A-6 (Ann. 59). See also *Background Paper*, pp. 18-20.

Section II. Nicaragua Has Openly Conducted Cross-Border Military Attacks on Its Neighbors

198. In addition to its efforts to destabilize its neighbors, Nicaragua has engaged in direct military attacks on both Honduras and Costa Rica. As described in Section II of Chapter III, the military forces of Nicaragua have achieved regionally intimidating dimensions.

199. The size and threat posed by the Sandinista military forces, and the Sandinista Government's manifest willingness to use them against neighboring States, have forced Nicaragua's neighbors to divert to defense scarce resources better devoted to addressing social and economic problems. As the Honduran Permanent Representative to the United Nations stated before the Security Council on 4 April of this year:

> "My country is the object of aggression made manifest through a number of incidents by Nicaragua against our territorial integrity and civilian population. Those elements, which have obliged [Honduras] to strengthen its defenses, are mainly the disproportionate amount of arms in Nicaragua, the constant harassment along our borders, the promotion of guerrilla groups which seek to undermine our democratic institutions, and the warmongering attitude of the Sandinist commanders[1]."

200. Nicaraguan armed incursions across its border with Honduras began soon after the Sandinistas took power. These incursions have taken place with frequency, and have included both direct entry of Nicaraguan military personnel into Honduras and mining of the Honduran road which runs along the border[2].

201. Nicaraguan armed forces have crossed into, fired upon or bombed the territory of Costa Rica — which possesses no army and whose security forces are armed only with light weapons — on several occasions since 1981[3], resulting this spring in the institution of a border commission by the four Contadora mediator countries at Costa Rica's request[4].

Section III. Nicaragua's Neighbors Have Requested Assistance from the United States in their Self-Defense

202. El Salvador, Honduras and Costa Rica have each sought outside assistance, principally from the United States, in their self-defense against Nicaragua's aggression. Pursuant to the inherent right of individual and collective self-defense,

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[1] S/PV.2529, 4 Apr. 1984, pp. 37-38 (Ann. 60).

[2] Honduras has protested such intrusions on numerous occasions. See, e.g., diplomatic notes from Honduran Ministry of Foreign Affairs to Nicaraguan Ministry of Foreign Affairs, 5 July 1983, 11 July 1983, 20 July 1984 (Ann. 61). See also Honduran Ministry of Foreign Affairs, "Resumé of Sandinista Aggressions in Honduran Territory in 1982", 23 Aug. 1982 (Ann. 62). In addition to military casualties, a number of Honduran and third-country nationals, including United States citizens, have been killed in the course of such direct attacks.

[3] Costa Rica, too, has protested such incursions. See, e.g., diplomatic notes from Costa Rican Ministry of Foreign Affairs to Nicaraguan Ministry of Foreign Affairs, 30 Sep. 1983, 29 Feb. 1984, 24 Apr. 1984 (Ann. 63).

[4] Diplomatic note from Costa Rican Foreign Ministry to Foreign Ministers of Colombia, Mexico, Panama and Venezuela, 2 May 1984 (Ann. 64).

and in accordance with the terms of the Inter-American Treaty of Reciprocal Assistance, the United States has responded to these requests[1]. At the same time, the common threat has resulted in expanded defense co-operation within Central America, particularly between Honduras and El Salvador.

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[1] Shultz affidavit, Ann. 1, para. 7. In addition to the assistance to El Salvador described in footnote 2 to para. 195, the United States has between 1979 and 1983 provided Honduras with some $84 million in security assistance (rising from $2.250 million in 1979 to $37.3 million in 1983 as the Nicaraguan threat increased) and approximately $290 million in economic assistance. Over the same period, the United States provided Costa Rica with less than $5 million in security assistance (rising over the same period from $0 to $2.6 million) and $230 million in economic assistance (Ann. 55).

CHAPTER II

THE UNDERLYING PROBLEMS OF CENTRAL AMERICA ARE REGION WIDE AND ARISE PRINCIPALLY FROM INTERRELATED SOCIAL, ECONOMIC, POLITICAL AND SECURITY FACTORS

203. It has been widely recognized, including by the parties to the Contadora process, that the current security problems of Central America cannot be resolved in isolation from their social, economic and political catalysts. The interrelationship of these problems was emphasized in the 10 January 1984 *Report of the National Bipartisan Commission on Central America*, which noted that:

> "the tortured history of Central America is such that neither the military nor the political nor the economic nor the social aspects of the crisis can be considered independently of the others. *Unless rapid progress can be made on the political, economic and social fronts, peace on the military front will be elusive and would be fragile*. But unless the externally-supported insurgencies are checked and the violence curbed, progress on these other fronts will be elusive and would be fragile." (Ann. 45, p. 4 (italics added).)

204. The problems of Central America are long standing, complex and region wide. They include a legacy of poverty, economic underdevelopment and instability, social inequity, disrespect for human rights, weak and unresponsive political and judicial systems and — largely as a result of the foregoing factors — endemic cyclic violence, both criminal and politically inspired. Particularly in Nicaragua, El Salvador and Guatemala, the dominance of a wealthy landholding class allied with authoritarian elements of the military forces has until recently impeded economic, agrarian and political reforms.

205. In addition, every country of the region has suffered from a series of major economic shocks: sharp increases in oil prices in the 1970s, a prolonged decline in the prices paid for the commodities upon which the economies of the region are all dependent, and high interest rates on their foreign debt. At the same time, the effectiveness of regional trade and financial institutions has declined.

206. These burdens have led to pressure for reform throughout the region. In El Salvador and Nicaragua, this pressure manifested itself in violent resistance to the traditional power structures of those countries and the coming to power of new governments pledged to programs of political, economic and social reform. The results of these pledges in Nicaragua are discussed in Chapter III.

207. El Salvador has made substantial progress in implementing this program[1]. Since 1979, El Salvador has implemented far-reaching land and banking reform, begun profound institutional changes in the security forces, undertaken a reform of the judiciary and other legal institutions, and elected a constituent assembly which prepared and enacted a new constitution. This process has culminated in

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[1] See, e.g., *Christian Science Monitor*, 10 Aug. 1984, p. 1 (Ann. 6[illegible]); *New York Times*, 2 Aug. 1984, p. A-22 (Ann. 66). The Department of State has periodically issued reports to Congress on developments in El Salvador. See, e.g., United States Department of State, *Report on the Situation in El Salvador*, 12 July 1984. Deposited by the United States pursuant to Art. 50 (2) of the Rules of Court.

the recent inauguration of President José Napoleón Duarte following his election in free and open voting in which some 80 per cent of the Salvadoran electorate participated.

208. Although Honduras has also suffered from many of the same problems of poverty and weak government, its social structure has never been as sharply stratified, nor its political system historically as unresponsive, as those of Nicaragua and El Salvador. In recent years, Honduras has consolidated a more open and democratic political system, thus strengthening the means for peaceful expression of political differences.

209. Costa Rica bears many of the same economic burdens as the other countries of Central America. Costa Rica, however, has long been a regional model of democratic government.

210. Guatemala has a long history of civil strife and a succession of military-dominated governments, but it too has moved in the direction of providing peaceful means of dissent as an element of national reconciliation. A constituent assembly to draft a new constitution and to prepare for governmental elections was democratically elected in July 1984.

CHAPTER III

REVOLUTION IN NICARAGUA

Section I. The 1979 Revolution in Nicaragua Promised Democratic Reforms and Was widely Supported Internationally

211. The uprising against General Somoza that began in 1978 was a response to the presence in Nicaragua, often in extreme form, of all of the social, economic and political pressures from which the region as a whole has long suffered. The success of the revolution in 1979 reflected the near-universal hostility of the Nicaraguan people to the Somoza régime, and the sympathy of the international community for the goals of the revolution.

212. Upon the departure of Somoza, power was assumed by a broad coalition of opposition forces[1], headed by the Junta of the Government of National Reconstruction (JGRN). The coalition came to power on a platform of electoral democracy, pluralism, respect for human rights, a mixed economy, a non-aligned foreign policy, full observance of human rights in accordance with the United Nations Universal Declaration on the Rights of Man and the American Convention on Human Rights, and the holding of free municipal and national elections[2].

213. The early policy statements and legislation issued by the new government gave the Nicaraguan people, Nicaragua's neighbors and the international community as a whole reason to hope that the patterns of the past had been broken[3].

214. In anticipation that, given adequate resources, the new régime would attempt to implement fully its program of reform, the JGRN enjoyed immediate

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[1] The coalition included parties spanning the political spectrum, labor, agrarian groups, business and the FSLN.

[2] These commitments were expressed in a series of pronouncements, including a letter to the Organization of American States (OAS) dated 12 July 1979. Text in Inter-American Commission on Human Rights (hereafter "IACHR"), *Report on the Situation of Human Rights in the Republic of Nicaragua*, 30 June 1981, OAS document OEA/Ser.L/V/II.53, doc. 25 (hereafter *IACHR Report on Nicaragua*), pp. 4-5. Deposited by the United States pursuant to Art. 50 (2) of the Rules of Court. That these undertakings were made directly to the OAS as well as to the Nicaraguan people was particularly appropriate in light of the unprecedented OAS action, joined in by the United States, depriving the Somoza Government of legitimacy, based on its violations of the human rights of its own population, even before Somoza had abandoned the instrumentalities of power. (Resolution II of Seventeenth Meeting of Consultation of Ministers of Foreign Affairs, 23 June 1979, reprinted in *IACHR Report on Nicaragua*, pp. 2-3.)

[3] Among many other explicit undertakings, the JGRN promised:

- full respect for enumerated human rights including freedom of the press and of thought, conscience and worship;
- the unrestricted functioning of political parties regardless of ideology;
- an independent and non-aligned foreign policy;
- a mixed economy and support for Central American integration;
- establishment of union rights and guarantee of the right to strike; and
- a "minimum" permanent military establishment.

and generous material support from the international community. The United States was the largest single donor, providing some $118 million in assistance in the first 18 months of the new Government's existence[1].

Section II. The Sandinista Régime Has Violated Its Domestic and International Promises

215. The Sandinista régime did move to implement certain of its promises — most notably in the fields of agrarian reform, health care and literacy. In other spheres, however, the new Government almost immediately began to ignore the platform on which it came to power. The FSLN has focused from an early date on the consolidation of its internal political control over the Nicaraguan State and society, progressively reducing the role of individuals, parties and groups not allied with the FSLN and increasing that of their own sympathizers[2]. The promised constitution has not yet been promulgated to replace that abrogated

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These undertakings, and others, are to be found in the 9 July "Program of the Junta of the Government of National Reconciliation" (Ann. 67); the 20 July 1979 "Estatuto Fundamental" ("Fundamental Statute"), *La Gaceta*, 22 Aug. 1979 (English translation provided) (Ann. 68), and the 21 Aug. 1979 "Estatuto Sobre Derechos y Garantias de los Nicaragüenses" ("Law on Rights and Guarantees of Nicaraguans"), *La Gaceta*, 17 Sep. 1979 (English translation in Comision Permanente de Derechos Humanos de Nicaragua (hereafter "CPDH"), *Decrees and Provisions of the Present Nicaraguan Legislation that Threaten Humans* [sic] *Rights*, Managua, 1983, pp. 32-44) (Ann. 69). Noteworthy as well is Decree No. 174 which gave the American Convention on Human Rights the force of internal law in Nicaragua: "Ley que Aprueba y Ratifica la Convención Americana Sobre Derechos Humanos Celebrada en San José, Costa Rica, 1969" ("Law Approving and Ratifying the American Convention on Human Rights, signed at San José, Costa Rica, 1969"), *La Gaceta*, 26 Nov. 1979 (English translation in *IACHR Report on Nicaragua*, p. 10) (Ann. 70).

[1] Although that assistance was terminated in light of Nicaragua's assistance to the Salvadoran guerrillas in their January 1981 "final offensive", until that time the United States Government had anticipated providing further substantial aid in subsequent years. (United States Agency for International Development (hereafter "AID"), *Annual Budget Submission, FY 83 (Nicaragua)*, Vol. 1, June 1981, pp. 1-9 (Ann. 71). AID, "United States Assistance to Nicaragua", 13 July 1979-31 May 1981, Ann. 72.)

[2] The two original non-Sandinista members of the Junta, Alfonso Robelo and Violeta Barrios de Chamorro, broke with the FSLN in April 1980 following the decision of the FSLN Directorate to modify the composition of the Council of State so as to assure FSLN control of that body (*IACHR Report on Nicaragua*, pp. 127-131). From this date the FSLN and the Government of Nicaragua must be considered as essentially identical, and are so treated in this Counter-Memorial.

The targets of FSLN repression have not been limited to parties and political opponents. The régime's systematic oppression of the Miskito Indian minority in the Atlantic region, leading to the large-scale flight of Miskitos from Nicaragua, is well-documented (IACHR, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OAS document OEA/Ser.L/V/II.62, doc. 10, rev. 3, 29 Nov. 1983. Deposited by the United States pursuant to Art. 50 (2) of the Rules of Court). The régime's policy toward the Roman Catholic Church was most clearly expressed in the treatment it afforded Pope John Paul II in his April 1983 visit to Managua, including efforts to drown out his sermon and preventing the faithful from approaching the podium. The régime has conducted a consistent policy of confrontation and intimidation of the Church and clergy (CPDH, *Report 1983* (annual report), pp. 17-21 (Ann. 73)).

Recently, following the Nicaraguan bishops' call, in an Easter "Pastoral Letter" (Ann. 74), for a dialogue with the armed opposition, JGRN Co-ordinator Daniel Ortega described the letter as part of an "internal destabilization plan" (Managua Domestic Service, 25 Apr. 1984, as transcribed in *FBIS*, 26 Apr. 1984, p. P-14 (Ann. 75)).

in July 1979; since it assumed power the Junta has governed on the basis of decree[1]. In September 1981, the Junta suspended important parts of the "Fundamental Statute" and "Law of Rights and Guarantees", and declared a one-year "State of Economic and Social Emergency[2]". This declaration substantially restricted the civil and political rights of Nicaraguans by making it a crime to spread "false" economic news; strikes and work stoppages were made illegal.

216. Those rights were further limited in 1982 by the imposition of a "State of National Emergency[3]". The State of Emergency, *inter alia*, expanded the restrictions on freedom of assembly, of speech and of travel within the country. It extended the pre-publication censorship "regarding matters that relate to the country's domestic security" first instituted in 1980[4].

217. The censorship has been complemented by direct or indirect FSLN control of all electronic media. The one major newspaper remaining outside FSLN control, *La Prensa* — which was also the principal organ for expression of dissent against the Somoza régime — has frequently been unable to print due to extensive censorship of its news material[5].

218. The Sandinista régime has also engaged in a massive military build up. Far from the minimal force envisioned in its 1979 pronouncements, since the earliest days of the régime there has been an unprecedented expansion of military forces. The military establishment of the Somoza régime peaked at roughly 14,000 during the 1978-1979 revolution[6]. Already by 1980 — a year before the first of the alleged incidents upon which Nicaragua bases its Application to this Court — Nicaragua's armed forces were roughly twice as large as they had been under Somoza[7]. By 1982, they had doubled again[8].

219. As of mid-1984, the military and security forces of Nicaragua on active duty numbered some 57,000 with 48,000 well-trained reserves and militia available for mobilization on short notice — some eight times the size of Somoza's forces at their peak during the 1978-1979 fighting[9]. The proportion of the population in arms has more than quintupled since 1977[10]. Moreover, the equipment at the disposal of these forces is vastly beyond that required for self-defence or internal security purposes. It includes in excess of 100 medium tanks — although no other country of the region possesses even one — as well as over 100 other armored vehicles. These land forces are far larger and better equipped than those

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[1] While in theory sharing this power with the Council of State, that body was first convened only in May 1980 and is controlled by the FSLN (*IACHR Report on Nicaragua*, pp. 25-27).

[2] "Ley de Estado de Emergencia Económica y Social" ("Law of Economic and Social Emergency"), *La Gaceta*, 10 Sep. 1981 (English translation provided) (Ann. 76).

[3] "Ley de emergencia Nacional" ("Law of National Emergency"), *La Gaceta*, 20 Mar. 1982 (English translation provided) (Ann. 77). See also *IACHR Report on Nicaragua*, pp. 60-62.

[4] *IACHR Report on Nicaragua*, pp. 115-118. The censorship has ranged so broadly as to include denial of permission to publish stories on the sharp rise in the price of children's toys.

[5] See, e.g., IACHR, *Annual Report 1982-83* (excerpts), p. 23 (Ann. 78).

[6] International Institute for Strategic Studies, *The Military Balance 1977-78*, London, 1978 (excerpts), p. 74 (Ann. 79).

[7] Based on figures compiled from unclassified sources by the United States Government (Ann. 80).

[8] Based on figures compiled from unclassified sources by the United States Government (Ann. 81).

[9] Based on figures compiled from unclassified sources by the United States Government (Ann. 82).

[10] Ann. 56, p. 7.

of any other country in the region[1]. The threat posed by the size and offensive capabilities of these forces has greatly increased the level of military tension in the region.

Section III. The Sandinista Régime's Policies Have Generated an Armed Internal Opposition

220. The policies of the Nicaraguan Government and their effects have given rise to increasing opposition among the Nicaraguan population. This opposition derives essentially from the fact that the FSLN has effectively reinstated and expanded upon many of the restrictions which had led to armed opposition to the Somoza régime. Not surprisingly, the internal opposition to FSLN policies has been led by many of the same groups and individuals who led the fight against Somoza.

221. The earliest opposition to FSLN policies took place within the Government. These efforts to modify the FSLN divergence from the original program of the revolutionary Government met with failure, and many important early supporters of the revolution and of the FSLN soon left the Government[2].

222. Opponents of FSLN policy also attempted to express their opposition through the media and in other peaceful ways, but the FSLN progressively closed off the opportunities for such non-violent expression of opinion[3]. By 1981 it had become clear that the régime was unprepared to respond to or permit continued serious criticism of its policies. Since that time, many groups in opposition to FSLN policies have begun to turn to violent resistance. Large-scale armed resistance to the Government did not begin until early 1982 — significantly post-dating the commencement of the current Government's military build-up, export of subversion and repressive internal policies herein described.

223. The goals of the opposition, and by contrast the intentions of the FSLN régime, have been crystallized in divergent policies toward participation in the

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[1] International Institute for Strategic Studies, *The Military Balance, 1983-84*, pp. 110 (El Salvador), 111 (Honduras), 112 (Nicaragua), 116 (Costa Rica) (Ann. 83). The military build up has been greatly assisted by the presence of a large number of military and security advisers from Cuba and extra-hemispheric countries, and by the provision to Nicaragua of large amounts of weapons and munitions by those countries (see Anns. 46-50, *Background Paper*).

[2] Original Junta members Violeta Barrios de Chamorro and Alfonso Robelo argued for adherence to the announced programme of the revolution. This view was supported by such individuals as Vice-Minister of Defense (and principal FSLN military commander during the fight against Somoza) Edén Pastora Gómez and Arturo Cruz Porras, head of the Central Bank, member of the Junta and later Ambassador to the United States under the new government (see Arturo Cruz, "Sandinista Democracy? Unlikely", *New York Times*, 27 Jan. 1984 (Ann. 84)). Robelo and de Chamorro left the Government in protest in April 1980. Edén Pastora left later that year; Cruz left in late 1981.

[3] The 30 June 1981 *IACHR Report on Nicaragua* describes in detail the internal situation at the time that Nicaragua asserts the United States instigated armed anti-government activity. That report makes abundantly clear the reasons why significant domestic opposition to the FSLN had arisen, and why elements of that opposition had concluded that peaceful opposition was no longer a feasible policy. That conclusion was bolstered not only by the Government's actions, but by statements such as that by Defense Minister Humberto Ortega, who in the summer of 1980 announced postponement of elections until 1985, and stated that there would be —

> "elections to improve the power of the revolution, but not a raffle to see who has power, because the people have power through their vanguard, the Sandinista National Liberation Front and its National Directorate" (*IACHR Report on Nicaragua*, p. 135).

elections scheduled for November. In addition to other continuing restrictions under the State of Emergency, the electoral law adopted by the Nicaraguan Government provides for a weekly total of only 30 minutes of television time, and 45 minutes of radio time, to be divided equally among seven parties, although these are to be the first elections following five years of continuous and virtually absolute FSLN control over the media and the State. The principal coalition of non-FSLN political parties within Nicaragua — the Democratic Co-ordinating Group (the so-called "Coordinadora") made clear in December 1983 the conditions it considered necessary for a free campaign[1]. Because the FSLN refused even to discuss most of those conditions, the Coordinadora has determined that it could not genuinely participate in the elections. In response, the FSLN accused Arturo Cruz, candidate of the three opposition parties making up the Coordinadora, of being a traitor[2].

224. Similarly, the leaders of the armed opposition have indicated readiness to lay down their arms and participate in elections if conditions for a free and open campaign are implemented[3]. The Government refused to discuss this offer; rather, it extended the State of Emergency until three weeks before the election, and announced that *in absentia* criminal trials of the principal leaders of the armed opposition would be held.

225. While, as requested by the opposition almost eight months ago, the Government has recently relaxed certain restrictions on civil rights "to further perfect" the electoral process[4], this action was taken one day *after* time had expired for registration by the Democratic Co-ordinating Group to participate in the elections. The régime has stated that as of midnight on that date unregistered parties lost the right to engage in political activity[5].

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[1] Text of nine conditions, *La Prensa*, 26 Dec. 1983, Managua, pp. 1, 10, as reprinted in *FBIS*, 5 Jan. 1984, pp. P-20-23 (Ann. 85).

[2] Junta member Sergio Ramírez Mercado, on "Face the People", Managua Domestic Service, 28 July 1984, as transcribed in *FBIS*, 31 July 1984, p. P-8 (Ann. 86).

[3] Alianza Revolucionaria Democrática (ARDE), *For Peace and Democracy in Nicaragua*, 20 Feb. 1984 (Ann. 87). Nicaraguan Democratic Force (FDN), *Declaration of the Nicaraguan Democratic Force of February 21, 1984*, 21 Feb. 1984 (Ann. 88). Press conference, Edén Pastora, 11 June 1984, AFP report, as reprinted in *FBIS*, 13 June 1984, p. P-26 (Ann. 89).

[4] "Ley Complementaria del Decreto 1477" ("Supplemental Law to Decree 1477"), 6 Aug. 1984 (unofficial text) (English translation provided) (Ann. 90). The rights restored included the right to strike, the right to publish adverse economic information, and — but only in cases thereafter arising — the law of "*amparo*" of personal liberty and security (roughly equivalent to *habeas corpus*). Further easing of restrictions has been announced subsequently.

[5] They are thus precluded from the rights to move freely in the country, promote their political positions or hold public meetings. In a draconian implementation of this policy, every article, photograph and commentary in *La Prensa* even marginally related to the Democratic Co-ordinating Group or any person associated with it was censored, and the newspaper refused to publish under conditions of such censorship the morning following expiration of the registration period.

CHAPTER IV

THE UNITED STATES, NICARAGUA AND THE OTHER STATES OF CENTRAL AMERICA HAVE AGREED TO RESOLUTION OF THE CONFLICT IN CENTRAL AMERICA THROUGH THE CONTADORA DISPUTE SETTLEMENT PROCESS

Section I. The Central American Parties and the United States as well as the Competent International Political Organs Have Agreed upon the Nature of the Dispute, the Scope of the Issues to Be Addressed in a Settlement and a Specific Procedure for the Peaceful Settlement of the Dispute

226. Regional concerns over Central American violence have resulted in efforts by several States, including the United States — both bilaterally and in support of regional efforts — to resolve the security situation in Central America peacefully. Several of these States, particularly during the past year, have dedicated considerable attention and resources to facilitating a comprehensive regional agreement for peace and co-operation through the so-called "Contadora process".

227. The fundamental thesis upon which these efforts have been built is that the violence in Central America involves interrelated conflicts among the States of the region — the product of Nicaraguan aggression against its neighbors — and, internally, within several States, driven by underlying problems of a social, economic and political nature. These efforts reflect the conclusion that the current violence cannot be effectively curbed without at the same time comprehensively addressing its underlying social, political and economic roots.

228. This approach has been accepted explicitly in the negotiations involving the nine countries making up the Contadora Group: Colombia, Mexico, Panama, Venezuela and the five Central American States, including Nicaragua. As the four mediator States noted in their 17 July 1983 Cancún Declaration on Peace in Central America:

> "Peace in Central America can become a reality only in so far as respect is shown for the basic principles of coexistence among nations: non-intervention; self-determination; sovereign equality of States; co-operation for economic and social development; peaceful settlement of disputes; and free and authentic expression of the popular will[1]."

229. This analysis has been adopted as well by the political organs of the international system, which have uniformly endorsed and deferred to the Contadora negotiating structure as the most appropriate and best-suited forum for addressing the complex of problems facing Central America. The Secretary-General of the United Nations set forth in his October 1983 report on Central America to the Security Council his own view

> "that any attempt at a solution should take into account the profound

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[1] "Cancún Declaration", Annex to "Letter dated 19 July 1983 from the Permanent Representatives of Colombia, Mexico, Panama and Venezuela to the United Nations addressed to the Secretary-General", A/38/303; S/15877, 19 July 1983 (Ann. 91).

> economic and social imbalances with which the Central American peoples have always struggled[1]".

230. Last September the nine members of the Contadora group prepared and formally adopted a 21-point Document of Objectives. This document manifested the agreement of all parties — including Nicaragua — as to the scope of the issues which must be addressed to achieve an enduring peaceful settlement of the conflict in the region[2]. The Document of Objectives calls for development of an agreement dealing with a wide range of social, political, economic and security issues and providing for effective verification of compliance. The document focuses on the need, *inter alia*, for an end to external support for terrorism, subversion and destabilization; for national reconciliation and respect for political and civil rights; for reduction of foreign military presences and of levels of armed forces; and for renewed economic co-operation.

231. The Document of Objectives reflects a consensus that, in order to end the conflict in the region, it is as important to remove the causes of internal armed conflict as it is to establish inter-State arrangements aimed at preventing cross-border military and para-military activity. Standing alone, arrangements to bring a halt to external support for armed opposition groups would be insufficient to stop the internal violence in those countries. Under such circumstances, effective monitoring or enforcement of inter-State arrangements would itself not be feasible.

232. The adoption of the Document of Objectives was welcomed by the General Assemblies of the United Nations and the OAS[3]. It has also been accepted by the United States as a basis for resolving its own concerns. Secretary Shultz has expressed the position of the United States as follows:

> "A verifiable agreement to implement the 21 points would address our concerns with Nicaraguan behavior, would meet the interests of the other Central American States, and would give Nicaragua a concrete framework for peaceful political and economic co-operation from its neighbors[4]."

The United States has acted on this statement of policy by lending active diplomatic and technical support requested by several Central American countries involved in the Contadora process.

Section II. The Contadora Process Has Resulted in a Draft "Acta" Addressing Regional Issues

233. At the time of the oral hearing in April on the Nicaraguan request for provisional measures, the Contadora participants were meeting in working groups to develop recommendations for the Foreign Ministers of the four mediating countries. As a result, in June of this year the four Contadora mediators pro-

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[1] "The Situation in Central America, Note by the Secretary-General", S/16041 **, 18 Oct. 1983 (Ann. 92).

[2] Annex to "The Situation in Central America, Note by the Secretary-General" (Ann. 92).

[3] Res. 38/10, 11 Nov. 1983 (Ann. 93). OAS General Assembly resolution of 18 Nov. 1983 on Peace Efforts in Central America (OAS document AG/RES. 675 (XIII-0/83)), Ann. II to S/16208, 9 Dec. 1983 (Ann. 94). The response to developments in the Contadora process by the political organs of the United Nations and the Organization of American States is discussed at greater length in Part IV of this Counter-Memorial.

[4] United States Department of State, *U.S. Efforts to Achieve Peace in Central America*, Special Report No. 115, 15 Mar. 1984, p. 6 (Ann. 95). Shultz affidavit, Ann. 1, para. 11.

vided the five Central American countries with a draft "'*Acta*' on Peace and Co-operation in Central America". Although not a final text, that document reflects the undertaking in the Document of Objectives to arrive at legally binding commitments relating to development of open democratic political systems, fostering economic co-operation and development, reducing the size of military establishments and halting support for subversion[1].

234. The *Acta* has now been accepted in principle by all five Central American States[2]. The nine members of the Contadora group are to meet again soon to determine the best way to proceed in completing negotiation of the comprehensive regional treaty. Development of the *Acta*, it need hardly be stated, represents "important progress" in the peace process[3].

Section III. The United States and Nicaragua Are Engaged in Negotiations Ancillary to the Contadora Process

235. Nicaragua has suggested that the United States has no role in the Contadora process (Memorial, para. 230). To the contrary, while not a direct participant in the meetings of the nine States engaged in that process, consistent with their own preference to maintain a subregional dialogue, the United States initiated, with the support of the Contadora group[4], and is currently conducting, bilateral discussions with Nicaragua in direct support of the Contadora negotiations[5].

236. These discussions were initiated by Secretary of State Shultz on his 1 June 1984 visit to Managua. Since that time, the Special Envoy of the President of the United States, Ambassador Harry W. Shlaudeman, and Vice-Minister of Foreign Affairs of Nicaragua, Victor Hugo Tinoco, have met on a number of subsequent occasions. While the two Governments have agreed that the content of those discussions shall remain strictly confidential, it is the United States view that they offer the prospect of contributing greatly to the success of the Contadora initiative[6].

Section IV. The United States Has Acted to Help Preserve the Viability of the Agreed Contadora Dispute Settlement Mechanism

237. The negotiations now taking place among the five Central American States under the aegis of the four Contadora mediators — as well as the

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[1] *La Nación*, San José, 11 July 1984, pp. 16A-17A and 12 July 1984, pp. 16A-17A (English translation provided) (Ann. 96).

[2] Radio Reloj, San José, 14 July 1984, as transcribed in *FBIS*, 16 July 1984, p. P-1 (Costa Rica); Radio Cadena, San Salvador, 28 June 1984, as transcribed in *FBIS*, 2 July 1984, p. P-3 (El Salvador); *La Estrella de Panamá*, 27 June 1984, as reprinted in *FBIS*, 28 June 1984, p. P-6 (Honduras); ACAN, Panama, 4 July 1984, as transcribed in *FBIS*, 5 July 1984, p. P-10 (Guatemala); Radio Sandino, Managua, 10 July 1984, as transcribed in *FBIS*, 11 July 1984, p. P-8 (Nicaragua); Managua Domestic Service, 25 July 1984, as transcribed in *FBIS*, 25 July 1984, p. P-7 (Nicaragua) (Ann. 97).

[3] FSLN National Directorate member Henry Ruiz, *Barricada*, Managua, 25 July 1984, p. 1 (English translation provided) (Ann. 98).

[4] See, e.g., NOTIMEX, Mexico City, 28 June 1984, as reprinted in *FBIS*, 2 July 1984, p. P-1 (Ann. 99).

[5] The United States has several times since 1981 attempted to initiate a constructive bilateral dialogue with Nicaragua (*U.S. Efforts to Achieve Peace in Central America*. (Ann. 95)).

[6] Nicaragua, too, appears to consider these talks constructive. *Washington Post*, 12 Aug. 1984, p. A-1 (Ann. 100).

complementary bilateral negotiations between the United States and Nicaragua — are explicitly founded on the conclusion that it is impossible effectively to resolve the inter-State armed conflicts in Central America without addressing the social, economic and political factors that give rise to internal violence. This thesis is also reflected in the negotiating text recently put forward by the mediators.

238. The United Nations Security Council[1], the United Nations General Assembly[2], and the General Assembly of the Organization of American States[3], have all recognized that the Contadora process offers the prospect of achieving a cessation of hostilities and a durable peace in the region. It is the first such prospect since the inception of the conflict in Central America.

239. The achievements of the Contadora process to date do not, however, ensure ultimate success. As with any international agreement, the definition of the dispute, identification of the issues to be addressed, and agreement on the mechanism to be utilized reflect a carefully negotiated compromise among the various parties.

240. During the proceedings before this Court in April 1984, the United States described Nicaragua's efforts to use fora other than the Contadora process to characterize the dispute in its own preferred manner and to address its own priority concerns in isolation from those of the other parties[4]. These efforts threatened to unravel the carefully constructed achievements of the Contadora mediators and were rebuffed by the various international political organs.

241. When the United States learned that Nicaragua might seek to utilize this Court for similar purposes, it sought to ensure that Nicaragua could not jeopardize the Contadora process in this manner. The United States was concerned that, should Nicaragua succeed in the tactic of initiating, outside the Contadora framework, protracted adjudication of selective issues, such adjudication — regardless of its ultimate outcome — could substantially delay, if not prevent, a peaceful settlement of the Central American conflict.

242. At the time the United States became aware that Nicaragua might attempt to engage this Court, however, the United States could not foresee what specific legal bases would be available to avoid these adverse consequences. For example, the United States could not know whether Nicaragua would take the steps necessary under Article 36 (2) and (4) of the Statute of the Court to accede to its compulsory jurisdiction prior to filing its Application. The United States also could not be aware of the form or scope of any Nicaraguan Application, and hence could not assess with any precision the issues of jurisdiction and admissibility to which it would give rise.

243. Under these circumstances, the United States modified temporarily the scope of its own acceptance of the compulsory jurisdiction of this Court in advance of Nicaragua's filing an Application. The United States modification temporarily suspended from the United States acceptance of compulsory jurisdiction disputes with Central American States or arising out of events in Central America. The United States thus intended to give the Contadora process time to

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[1] S/RES/530 (1983), 18 May 1983 (Ann. 101).

[2] UNGA, res. 38/10, 11 Nov. 1983 (Ann. 93).

[3] General Assembly resolution of 18 Nov. 1983 on Peace Efforts in Central America (Ann. 94).

[4] **I**, pp. 81-82, 83, 100-101, 102.

succeed. As their communications to the Court indicate[1], the other Central American States concurred that the multilateral Contadora process, not bilateral adjudication, is the most promising avenue for the achievement of a lasting peace in Central America.

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[1] Communication to the Registrar of the Court from Costa Rica, 18 April 1984 (Ann. 102). Communication to the Registrar of the Court from El Salvador, 19 April 1984 (Ann. 103). Note from Honduras to the Secretary-General of the United Nations, 18 April 1984 (Ann. 104). Guatemalan Ministry of Foreign Affairs, Press Release, 16 April 1984 (Ann. 105).

PART III. NICARAGUA'S CLAIMS DO NOT COME WITHIN THE SCOPE OF THE UNITED STATES CONSENT TO THE COURT'S JURISDICTION

INTRODUCTION

244. Unlike Nicaragua, the United States has made a declaration (the "26 August 1946 declaration[1]") accepting the Court's compulsory jurisdiction pursuant to Article 36 (2) of the Statute of the Court. The contentious jurisdiction of the Court requires the consent of the respondent State as well as that of the applicant. Nicaragua must, therefore, show that its claims come within the scope of the United States 26 August 1946 declaration, as well as within the scope of an effective declaration by Nicaragua itself[2]. The United States will show in Part III of this Counter-Memorial that, for each of two reasons, the claims set forth in Nicaragua's Application do not, in fact, come within the scope of the United States consent to this Court's compulsory jurisdiction. The Court therefore lacks jurisdiction over Nicaragua's Application, irrespective of the validity of Nicaragua's 1929 declaration.

245. First, Nicaragua's claims arise out of multilateral treaties, notably the Charters of the United Nations and the Organization of American States. The claims also involve region-wide disputes, all of the parties to which are not before this Court. The United States expressly stated in the 1946 Declaration that its consent to this Court's jurisdiction did not extend to such multiparty disputes based on multilateral treaties unless all of the parties to those disputes were before the Court. Nicaragua's claims do not, therefore, come within the terms of the 26 August 1946 declaration.

246. Second, the United States modified the 1946 Declaration on 6 April 1984 to suspend from the United States consent to the Court's jurisdiction, for a period of two years, any claims presenting a "dispute with a Central American State" and any claims that "arise out of", or are "related to", "events in Central America". The claims in Nicaragua's Application come squarely within the terms of the 6 April note in both respects. There can, accordingly, be no question that, when Nicaragua's Application was filed on 9 April 1984, the United States did *not* consent to the Court's adjudication of the claims set forth therein.

247. The United States will examine in Part III of this Counter-Memorial each of these fatal defects in Nicaragua's contention that this Court has juris-

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[1] The United States declaration was signed by President Truman on 14 August 1946 and deposited with the Secretary-General on 26 August 1946 (*I.C.J. Yearbook 1982-1983*, pp. 88-89). Since, in accordance with the terms of Article 36 (4) of the Court's Statute, the declaration became effective on the date of deposit, the United States will refer to the declaration as the "26 August 1946 declaration".

[2] Nicaragua principally founds its contention that the United States has accepted the Court's jurisdiction over its Application on the 26 August 1946 declaration (Application, para. 13; Nicaraguan Memorial, paras. 2, 5). In its Memorial, Nicaragua also contends for the first time that the United States consented to jurisdiction in a bilateral Treaty of Friendship, Commerce and Navigation. That contention is discussed in Part I, Chapter II, of this Counter-Memorial.

diction over Nicaragua's Application. Because the Parties' arguments raise fundamental questions as to the nature of this Court's jurisdiction, the United States will first examine the consensual basis of that jurisdiction and its relevance to the present case.

CHAPTER I

THE COURT HAS JURISDICTION OVER NICARAGUA'S CLAIMS ONLY IF THE UNITED STATES HAD EXPRESSLY CONSENTED TO THAT JURISDICTION IN THE UNITED STATES DECLARATION IN FORCE ON THE DATE THAT NICARAGUA FILED ITS APPLICATION WITH THE COURT

248. The consensual basis of this Court's contentious jurisdiction is axiomatic. In one of the first cases to come before the Permanent Court of International Justice, that Court observed that it is:

> "well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement" (*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, at p. 27).

Similarly, the Permanent Court stated in the *Chorzów Factory* case that:

> "the Court's jurisdiction is always a limited one existing only in so far as States have accepted it . . . The Court's aim is always to ascertain whether an intention on the part of the parties exists to confer jurisdiction upon it." (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, at p. 32.)

249. In the present Court's first judgment, Judges Basdevant, Alvarez, Winiarski, Zoričić, De Visscher, Badawi Pasha and Krylov affirmed that this fundamental jurisdictional principle applies to this Court's jurisdiction as well:

> ". . . Under the régime of the Charter [of the United Nations], the rule holds good that the jurisdiction of the International Court of Justice, as of the Permanent Court of International Justice before it, depends on the consent of the States parties to a dispute." (*Corfu Channel, Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948*, p. 15, sep. op., p. 31.)

In the following year, the majority of the Court stated that a claim "cannot, in the present state of the law as to international jurisdiction, be submitted to a tribunal, except with the consent of the States concerned" (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 178). And in 1950, the majority of the Court observed that "[t]he consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 65, at p. 71).

250. Many similar statements by this Court and its predecessor could be recited here. Suffice it to say that in a judgment rendered earlier this year the Court expressly reaffirmed "the basic principle that the jurisdiction of the Court to deal with and judge a dispute depends on the consent of the parties thereto" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application by Italy for Permission to Intervene, I.C.J. Reports 1984*, p. 3, at p. 22).

251. Jurisdictional determinations are made as of the time of seisin, that is,

the date on which an application is filed with the Court (see discussion in Chapter III of this Part, *infra*). As the United States will now show, Nicaragua's claims did not come within the scope of the United States declaration in effect on date of seisin, and the Court does not, therefore, have jurisdiction over those claims.

CHAPTER II

THE MULTILATERAL TREATY RESERVATION TO THE UNITED STATES DECLARATION EXPRESSLY EXCLUDES NICARAGUA'S CLAIMS FROM THE SCOPE OF THE UNITED STATES ACCEPTANCE OF THIS COURT'S COMPULSORY JURISDICTION BECAUSE ANY DECISION THAT THE COURT COULD RENDER WOULD AFFECT STATES NOT BEFORE THE COURT THAT ARE PARTY TO THE MULTILATERAL TREATIES ON WHICH NICARAGUA RELIES

Section I. Introduction

252. Proviso "c" of the United States declaration of 26 August 1946, the "multilateral treaty reservation", provides that the United States acceptance of the Court's compulsory jurisdiction shall not extend to —

> "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction . . .".

The United States has not specially agreed to jurisdiction here. The Court may, therefore, exercise jurisdiction over Nicaragua's claims consistent with the multilateral treaty reservation only if all treaty parties affected by a prospective decision of the Court are also parties to the case. In this Chapter, the United States will show that all of the States likely to be affected by adjudication of Nicaragua's claims are not before the Court, and that, in accordance with the multilateral treaty reservation, Nicaragua's claims therefore do not come within the scope of the United States consent to the Court's compulsory jurisdiction.

253. The multilateral treaty reservation reflects three specific concerns: (1) the United States does not wish to have its legal rights and obligations under multilateral treaties adjudicated with respect to a multilateral dispute unless the rights and obligations of *all* the treaty parties involved in that dispute will also be adjudicated; (2) adjudication of bilateral aspects of a multilateral dispute is potentially unjust in so far as absent States may have sole possession of facts and documents directly relevant to the rights of the parties to the adjudication *inter se*; and (3) adjudication of bilateral aspects of a multilateral dispute will inevitably affect the legal rights and practical interests of the absent States.

254. Nicaragua's claims arise under multilateral treaties and involve a multilateral dispute. Other Central American States that are parties to both the treaties and the dispute on which the Application is based are not before the Court and cannot be compelled to enter this proceeding. Under these circumstances, Nicaragua's Application comes directly within the terms of the multilateral treaty reservation and gives rise to all of the concerns that underlie that reservation. Adjudication of Nicaragua's claims: (1) may prejudice the United States by binding the United States to a decision of the Court without similarly binding the other treaty parties involved in the region-wide dispute in Central America; (2) may also prejudice the United States by determining the United States rights and duties in the absence of directly relevant facts and documents that are in the sole possession of absent States; and (3) may prejudice the rights of the other Central American States by determining, in their absence, the lawfulness of

responses to Nicaragua's armed attacks against them, including their inherent rights to engage in self-defense and to request United States assistance in resisting Nicaragua's attacks.

Section II. The Intent and Effect of the Multilateral Treaty Reservation Are to Preclude Jurisdiction when Treaty Parties that Would Be Affected by the Court's Decision Are not Before the Court

255. The Parties agree that the multilateral treaty reservation[1]

> "would appear to create an exception to the United States' acceptance of the compulsory jurisdiction of the Court with respect to disputes arising under a multilateral treaty where not all of the parties to the dispute are present before the Court" (Nicaraguan Memorial, para. 264[2]).

In this Section, the United States will show that this exception to the United States acceptance of the Court's compulsory jurisdiction resulted from fundamental concerns that the rights of the United States and of absent States not be prejudiced by adjudication of bilateral aspects of multilateral disputes.

A. The Multilateral Treaty Reservation Was Adopted Specifically to Preclude Jurisdiction when Treaty Parties that Would Be Affected by the Court's Decision Were Not before the Court

256. The drafters of the United States declaration were concerned that the Court might, when resolving an international dispute arising under a multilateral treaty, effectively bind some, but not all, of the States involved in that dispute. This fear was addressed by the United States Senate in its consideration of the proposed declaration accepting the Court's compulsory jurisdiction. To ensure that the United States would not be bound by a decision of the Court arising under a multilateral treaty unless other States involved in the same dispute were also bound, the Senate added the multilateral treaty reservation to the proposed declaration.

257. The idea of adding to the United States declaration a proviso that would address these concerns originated with the Honorable John Foster Dulles, who submitted a memorandum to the Senate Foreign Relations Committee advocating

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[1] In its Memorial, Nicaragua describes the multilateral treaty reservation as the "Vandenberg Amendment", referring to the United States Senator who sponsored the reservation on the floor of the United States Senate (para. 259).

[2] Nicaragua, citing legal commentators, criticizes the multilateral treaty reservation as being ambiguous (Memorial, para. 262). Nicaragua overlooks the fact that the reservation has, in general, been criticized because it is susceptible of a broad interpretation — that it precludes the Court's jurisdiction unless all parties to a *treaty* are before the Court. (See, e.g., J. G. Merrills, "The Optional Clause Today", 50 *British Year Book of International Law*, p. 87, at p. 107 (1979).)

It is true that several scholars commenting on the reservation at the time of its adoption expressed the view that the multilateral treaty reservation requires the presence of *all* parties to the multilateral treaties cited by the Applicant, not just those parties that would be affected by the Court's decision. (See, e.g., M. O. Hudson, "The World Court: America's Declaration Accepting Jurisdiction", 32 *American Bar Association Journal*, p. 832, at p. 895 (1946).) But such an interpretation "undoubtedly goes beyond the intent of the Senate". (F. O. Wilcox, "The United States Accepts Compulsory Jurisdiction", 40 *American Journal of International Law*, p. 669, at pp. 714-716 (1946).) If the reservation were interpreted as Judge Hudson suggested, the Court would nevertheless be without jurisdiction over this case because not all parties to the treaties cited by Nicaragua are parties to this case.

acceptance of the Court's jurisdiction, but also recommending that several aspec of compulsory jurisdiction should "be clarified[1]". "Oftentimes," Mr. Dull observed, "disputes, particularly under multilateral conventions, give rise to th same issue as against more than one nation." In such cases —

> "it might be desirable to make clear that there is no compulsory obligatio to submit to the Court merely because one of several parties to such dispute is similarly bound, the others not having bound themselves t become parties before the Court and, consequently, not being subject to th [United Nations] Charter provision (Art. 94) requiring members to compl with decisions of the Court in cases to which they are a party[2]".

258. Article 59 of the Court's Statute provides that only *parties* to a case ar bound by decisions of the Court. The drafters of the United States declaratio recognized that the effect of Article 59 was that treaty parties involved in multilateral dispute that were not before the Court would not be bound by decision of the Court[3]. And, indeed, since the majority of States had not accepte the Court's compulsory jurisdiction in any respect, many States involved in multilateral dispute could not be compelled to come before the Court in th same or a related proceeding. The drafters concluded that, in cases when a affected treaty parties were not, and could not be brought by the United State before the Court, the United States itself should not consent to have its right and obligations adjudicated.

259. During further consideration of the proposed declaration, the Senat Foreign Relations Committee received a memorandum from Mr. Charles Fahy Legal Adviser to the Department of State, suggesting how the proposed declaration could be amended to respond to the concerns raised by Mr. Dulles. I response to Mr. Fahy's suggestions[4], the Committee's report to the full Senat recommended:

> "If the United States would prefer to deny jurisdiction without specia agreement, in disputes among several states, some of which have not declare to be bound, article 36 (3) permits it to make its declaration conditional a to the reciprocity of several or certain states.
>
> Mr. Dulles' objection might possibly be provided for by another subsectio in the first provision of the resolution . . . reading:
>
> '*c*. Disputes arising under a multilateral treaty, unless (1) all parties t the treaty affected by the decision are also parties to the case before th Court, or (2) the United States specially agrees to jurisdiction[4].'"

260. The concern voiced by Mr. Dulles and by various members of the Senat Foreign Relations Committee that adjudication in the absence of all affecte parties posed substantial risks for the United States was shared in the Senate a large. As a result, when Senator Vandenberg introduced the proviso suggeste by the Senate Foreign Relations Committee in the full Senate, urging that th

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[1] Memorandum of John Foster Dulles concerning Acceptance by the United States o the Compulsory Jurisdiction of the International Court of Justice (hereafter "Dulle Memorandum"), reprinted in *Compulsory Jurisdiction, International Court of Justice Hearings Before a Subcommittee of the Senate Committee on Foreign Relations on S. Res 196*, 79th Cong., 2d Sess., p. 44 (1946). A copy of the Dulles Memorandum is appendec as Ann. 106.

[2] *Ibid.*

[3] *Report of the Foreign Relations Committee*, No. 1835 (hereafter "*Committee Report*") at p. 6. A copy of the *Committee Report* is appended as Ann. 107.

[4] *Committee Report*, at pp. 6-7.

United States should "spell out" this concern[1], the reservation was accepted without opposition and became part of the United States declaration approved by the Senate[2].

B. The Exclusion from International Arbitration or Adjudication of Matters Affecting the Interests of Absent Third Parties Has Been a Consistent United States Practice before and after Adoption of the Multilateral Treaty Reservation

261. The multilateral treaty reservation was a natural evolution of long-standing United States practice in this area. The United States has never considered it appropriate to arbitrate bilateral aspects of multilateral disputes. This policy is reflected in the extensive experience of the United States with international agreements regarding dispute resolution, both before and since the Senate adopted the multilateral treaty reservation.

262. States concluded a large number of general bilateral arbitration treaties during the first two decades of this century. Most of these agreements specifically excluded from the "differences . . . of a legal nature" that were to be referred to arbitration all matters that "concern the interests of third parties[3]". Among these were bilateral treaties entered into between the United States and 22 nations during 1908-1909, each containing an identical refusal to submit claims that "concern the interests of third Parties[4]".

263. United States experience with one early international tribunal confirmed its resolve to preclude the exercise of jurisdiction over claims involving absent third parties. After conclusion of the Bryan-Chamorro Convention of 5 August 1914 between the United States and Nicaragua[5] (affording the United States certain rights regarding construction of an inter-oceanic waterway in Nicaragua), Costa Rica and El Salvador sought to annul the treaty by asserting claims against Nicaragua in the Central American Court of Justice. Notwithstanding its lack of jurisdiction over the United States, which was not a party to the instruments establishing that Court, the Central American Court rejected Nicaragua's contention that the Court was without jurisdiction to hear the Costa Rican and Salvadoran claims in the absence of the United States. The Court maintained that it had sufficient jurisdiction, despite the absence of the United States, to adjudicate the Costa Rican and Salvadoran claims against Nicaragua, and found for each against Nicaragua[6].

264. The United States objected, in a letter to the Government of Costa Rica, that the Court had exercised jurisdiction over the case despite the fact that the

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[1] 92 Cong. Rec., p. 19618 (1 August 1946).

[2] 92 Cong. Rec., p. 10706 (2 August 1946).

[3] This group of approximately 40 treaties was modelled on the Anglo-French treaty of general arbitration of 1903. *Traités généraux d'arbitrage*, 1 ser., p. 33. See also H. M. Cory, *Compulsory Arbitration of International Disputes*, pp. 51-53 (1932).

[4] See, e.g., Arbitration Convention between the Government of the French Republic and the United States of America, March 14, 1908, Art. I; I. W. Malloy, *Treaties Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers, 1776-1909*, p. 549. A complete listing of these treaties appears in H. M. Cory, *op. cit.*, p. 55, n. 8.

[5] *USTS* 624.

[6] *Costa Rica* v. *Nicaragua*, 5 *Anales de la Corte de Justicia Centroamericana*, pp. 130-176, reprinted in 11 *American Journal of International Law*, p. 181 (1917); *El Salvador* v. *Nicaragua*, 6 *Anales*, p. 171, reprinted in *ibid.*, p. 674. Nicaragua refused to abide by the Court's decisions, claiming that the Court was without jurisdiction to render them. See A. S. Bustamante, "The First Court of International Justice and the Causes of its Dissolution", in N. Bentwich, *Justice and Equity in the International Sphere*, p. 37 (1936).

United States could not be made a party, noting that it was "manifestly not contemplated" that the Central American Court —

> "established for the settlement of difficulties between the Governments signatory to the Convention, would undertake jurisdiction of matters concerning the diplomatic relations between those countries and the United States[1]".

265. Influenced by the Central American Court's attempt to adjudicate a matter affecting one of its treaties despite United States absence, the United States subsequently insisted upon the exclusion from the jurisdiction of international tribunals of disputes involving the rights or obligations of absent parties. Thus, when the question of United States acceptance of the compulsory jurisdiction of the Permanent Court of International Justice came before the United States Senate, various Senators insisted on a number of reservations that would have prevented adjudication in the absence of all concerned parties. Among these was a provision proposed in 1926 that would have provided that the Permanent Court shall not

> "without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest[2]".

266. A large number of bilateral arbitration treaties was concluded during the 1920s. As Judge Manley Hudson noted, for most States this generation of treaties "favored the extension of jurisdiction to disputes, as it was put in the Locarno treaties of 1925, 'even when other Powers are also interested in the dispute[3]' ". The United States, however, rejected this approach. In a series of 28 arbitration treaties concluded in 1928 and 1929, the United States instead required the inclusion in each treaty of a provision that it "shall not be invoked in respect of any dispute the subject-matter of which . . . involves the interests of third Parties[4]".

267. The United States required a similar preclusion in the General Treaty of Inter-American Arbitration, concluded in 1929, Article 2 of which excludes from arbitration matters "which affect the interest or refer to the action of a state not a party to this treaty[5]". A member of the United States delegation to the Conference that drafted the Inter-American Treaty, Charles Evans Hughes, later Chief Justice of the United States Supreme Court, described the United States position on absent parties:

> "[I]f a third state has an interest in the controversy, or if the action of the third state is to be the subject of discussion, *it is manifest that there ought not to be an arbitration which draws on that interest or action even though the award might not be binding upon the third state*[6]".

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[1] Letter from Frank L. Polk, Acting Secretary of State, to the Minister of Costa Rica, 22 May 1916, reprinted in *1916 Foreign Relations of the United States*, pp. 837-838.

[2] U.S. Senate Document No. 45, 69th Cong., 1st Sess. (1926). See also Hudson, *The Permanent Court*, pp. 218-219.

[3] M. O. Hudson, *International Tribunals*, p. 97 (1944).

[4] See, e.g., Treaty of Arbitration Between France and the United States of America, 6 February 1928, art. 3, 38 Stat. 1887. A full listing of the United States treaties containing this provision may be found in *United Nations Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928-1948*, p. 37 (1949).

[5] General Treaty of Inter-American Arbitration, 49 Stat. 3153.

[6] Provisional Minutes of the Conference, Arbitration Committee, 3 January 1929, p. 17, as cited in J. O. Murdoch, "Arbitration and Conciliation in Pan America", 23 *American Journal of International Law*, p. 273, at pp. 283-284 (1929) (italics added).

Mr. Chief Justice Hughes described this principle as "an historical exception which has always been made" in bilateral arbitration treaties[1].

268. United States practice subsequent to the adoption of the multilateral treaty reservation also reflects a refusal to participate in international adjudication in the absence of affected third parties. In *Rights of Nationals of the United States of America in Morocco*, France, acting apparently in its role as Protector of Morocco, asserted a claim against the United States regarding certain fiscal immunities claimed by the United States for its nationals resident in Morocco. France failed to make clear whether both France and Morocco were to be considered parties to the case and thus bound by the Court's decision (*Judgment, I.C.J. Reports 1952*, p. 176, at pp. 179-181). The United States raised a preliminary objection requesting a suspension of the proceedings pending clarification of the binding effect of the Court's decision. The United States withdrew the objection only upon receiving assurances that both France and Morocco would consider themselves bound by the Court's decision (Preliminary Objection of the United States of America, 15 June 1951, *I.C.J. Pleadings, Rights of Nationals of the United States of America in Morocco*, Vol. I, at pp. 235-238, pp. 253-254 (1952)[2]).

269. In addition, numerous more recent international agreements concluded by the United States, including a series of bilateral economic co-operation agreements relating to the "Marshall Plan", have contained commitments to submit controversies under the agreements to this Court, but have excepted from the Court's jurisdiction matters precluded by the reservations contained in the United States declaration[3].

C. The Multilateral Treaty Reservation Protects the United States and Third States from the Inherently Prejudicial Effects of Partial Adjudication of Complex, Multiparty Disputes

270. The multilateral treaty reservation thus evolved from a long-standing United States practice with respect to international arbitration generally and was drafted in response to specific concerns as to how bilateral aspects of multilateral disputes might come before this Court. In light of this historical and legislative background, it will be seen that the reservation serves several important interests.

271. First, it ensures the United States that all treaty parties involved in a multilateral dispute will be bound by a decision of the Court applying the treaty

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[1] 23 *American Journal of International Law*, at p. 15. Mr. Chief Justice Hughes described adjudication of the rights and interests of an absent third party as "indecorous". *Ibid.*

[2] Furthermore, because certain multilateral treaties regarding immunities in Morocco formed part of the basis of the French Application, the United States made a point of specially agreeing to the Court's jurisdiction, doing so expressly without prejudice to its future ability to assert the reservations contained in its declaration:

> "The United States Government does not raise any jurisdictional issue in [this] proceeding, even though it does not concur in the allegations with respect to the compulsory jurisdiction of the Court which have been presented by the French Government, it being its understanding that its abstaining from raising the issue does not affect its legal right to rely in any future case on its reservations contained in its acceptance of the compulsory jurisdiction of the Court." (Counter-Memorial submitted by the Government of the United States of America, 20 December 1951, *ibid.*, p. 262.)

[3] See, e.g., Economic Cooperation Agreement Between the United States and France, June 28, 1948, 62 Stat. 2223, *TIAS* 1783 (Art. X); Economic Cooperation Agreement Between the United States of America and Italy, June 28, 1948, 62 Stat. 2421, *TIAS* 1789 (Art. X).

to the dispute. The United States does not agree to be subject to the unequal treatment of being bound by a Court decision that does not also bind all treaty parties involved in a dispute. Nor does the United States believe that States should be bound only as to selected parties to a dispute; each State before the Court should be bound as against all other States involved in the dispute.

272. Second, fundamental considerations of justice require that both the facts of a case and the legal positions of all parties be fully presented before a binding legal decision is issued by the Court. When a dispute involves more than two States, the rights even of those two States *inter se* may be dependent on legal interests of third States and on facts that are only available to third States. An adjudication of bilateral claims in the absence of directly related facts and legal interests is inherently unjust.

273. Third, the United States does not believe that absent States should, as a practical or legal matter, be affected by decisions of the Court. To be sure, Article 59 of the Court's Statute provides that a "decision of the Court has no binding force except between the parties and in respect of that particular case". Article 59, however, does little more than deny *res judicata* effects of Court decisions to States that are not parties to a case[1]. Court decisions may well establish definitive interpretations of a treaty for all parties to that treaty. And, as the present case graphically illustrates, an adjudication of the rights of two States before the Court may effectively delimit the legal rights and practical interests of third States that are not before the Court but which are involved in multilateral disputes with the parties to the case.

274. These fundamental considerations underlying the multilateral treaty reservation are similar to some of the considerations underlying the intervention rules of the Court and the Court's own "indispensable party" practice. The concerns of the United States with respect to partial adjudication of multilateral disputes, however, go considerably beyond the Court's intervention and "indispensable party" standards. In particular, neither the intervention rules nor the indispensable party standard addresses the concern of the United States, directly relevant here, that it not be the only one of several parties to a multilateral dispute bound by a decision of the Court.

275. Article 63 of the Court's Statute provides for intervention as of right by parties to a convention when construction of that convention is in issue. Article 63 recognizes that every party to a convention will be affected by its construction and "necessarily has an interest in the matter[2]". As Judge Oda has explained, "there is little doubt that, in a case where the construction of a particular convention is in dispute, the construction placed on it by the Court in a previous case will tend to prevail" in a subsequent case brought under the same convention[3]. This Court's Statute therefore makes clear that any party to a multi-

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[1] The United States Senate drafters were aware of the effect of Article 59 (*Committee Report*, p. 6), and concluded that Article 59 was insufficient to protect the rights of the United States in disputes arising under multilateral conventions.

[2] G. Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-4; Questions of Jurisdiction, Competence and Procedure", 34 *British Year Book of International Law*, p. 1, at p. 125 (1958). Indeed, the relationship between Articles 62 and 63, and the conclusion that any State would be legally affected by a decision construing a convention to which it is a party, led Judge Hudson to conclude that all treaty parties would be "affected by" a decision construing the treaty, and therefore that the multilateral treaty reservation requires the presence of *all* treaty parties before the Court can exercise jurisdiction (M. O. Hudson, *op. cit.*, at p. 895).

[3] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Application to Intervene), Judgment, I.C.J. Reports 1981*, p. 3, at p. 30 (sep. op. of Judge Oda).

lateral treaty being construed by the Court has a legal interest that may be affected by the Court's decision.

276. Article 63 thus *permits* a third State that believes its interests will be affected by a decision of the Court construing a multilateral convention to which it is a party to intervene and protect its rights. The third State cannot, however, be *compelled* to appear in the proceeding[1]. Thus, the United States, when confronted with an Application that presents claims arising out of multilateral treaties and involving multilateral disputes, has no means of bringing before the Court all the other parties to those disputes. The United States cannot ensure that its own rights and obligations will be adjudicated in light of directly related rights and obligations of the absent States, or in the light of facts or documents that may be directly relevant to its rights and obligations but are in the sole possession of absent States. Most importantly, the United States confronts the possibility of a legal determination of its rights and interests when the legal rights and interests of other parties to the dispute — including the obligations of the applicant State vis-à-vis the absent States — will not be determined. These are the interests that the multilateral treaty reservation was designed to protect. These interests go far beyond the protections afforded by the Court's intervention rules.

277. For similar reasons, the multilateral treaty reservation is broader than the Court's indispensable party practice. In *Monetary Gold*, *op. cit.*, page 19, at page 32, the Court held that, because of the consensual nature of its jurisdiction, it cannot adjudicate claims where the rights of absent States form the "very subject-matter of the dispute". The Court's practice in this regard protects the interests of absent States — *one* of the concerns underlying the multilateral treaty reservation. But even though an absent State's interests may not form the "very subject-matter of the dispute" and thus preclude adjudication under the standards of *Monetary Gold*[2], the State's absence may bring into play the other, more fundamental concerns underlying the multilateral treaty reservation.

278. The absent State, for example, may have legal interests directly related

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[1] *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 19, at p. 32 (hereafter, "*Monetary Gold*"); *Continental Shelf (Libyan Arab Jamahiriya* v. *Malta) (Application to Intervene), I.C.J. Reports 1984*, p. 1, at p. 25. Nor can the United States be assured that other parties to the dispute would ever appear before the Court since the majority of States have not accepted the Court's compulsory jurisdiction in any respect, and therefore could not be brought before the Court even in an unrelated proceeding to adjudicate their rights and duties in the dispute.

[2] As the United States demonstrates in Part IV, Chapter I, the "very subject-matter" of Nicaragua's Application in fact is the interests of absent States, and the Application is, in accordance with *Monetary Gold*, inadmissible. It bears emphasis, however, that the multilateral treaty reservation is broader by its terms than either the "indispensable party rule" of *Monetary Gold* or the Court's general intervention standards under Article 62. The plain language of the reservation precludes the Court's jurisdiction whenever a treaty party will be "affected" by the Court's decision. The effects contemplated by the reservation are not limited to effects on legal rights and obligations of the absent State. The reservation applies if the effect is a practical one; for example, if the Court were to decide in a case between two States that one of them could not provide aid to a third State, that third State would suffer the practical consequences. In this respect, the reservation differs from Article 62 of the Court's Statute, which applies only when a State has at stake "interests of a legal nature". (See, *Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Application to Intervene), I.C.J. Reports 1981*, p. 3, at p. 19.)

Moreover, the Court's decision in *Monetary Gold* makes clear that the Article 62 intervention standards for an affected legal interest are less stringent than the indispensable party rule. In *Monetary Gold* the Court declined to resolve a dispute between Italy and the United Kingdom because resolution of that dispute would have required it to "adjudicate to those at issue in the case and may be privy to facts and documents directly relevant to the case. The absent State, although, *ex hypothesi*, a party to the dispute, will not be legally bound by a decision of the Court. Conversely, and potentially equally importantly, the Applicant State filing a claim against the United States will not have its rights and obligations vis-à-vis absent States determined. In short, of the three or more States party to a multilateral dispute, *only* the United States in such circumstances may be bound by the decision of the Court. This is precisely the situation foreseen by the drafters of the multilateral treaty reservation. The United States did not consent to adjudication of claims under such circumstances.

Section III. Because States that Would Be "Affected by" the Court's Decision Are not Present, the Court Is without Jurisdiction over Nicaragua's Application

279. Nicaragua's Application, together with its Memorial and its other submissions to the Court in this case, make clear that other Central American States would be affected by the Court's decision in this case. With respect to Honduras and Costa Rica, this is indisputable on the face of Nicaragua's Application. The Affidavit of Secretary of State Shultz (Ann. 1) and the public statements of Salvadoran leaders establish that El Salvador, too, will unquestionably be "affected", in a legal and practical sense, by adjudication of Nicaragua's claims. Because Honduras, Costa Rica and El Salvador are parties to each of the four multilateral treaties on which Nicaragua relies[1], the United States multilateral treaty reservation precludes the Court's jurisdiction over Nicaragua's claims.

A. Nicaragua's Application on Its Face Affects the Interests of Honduras and Costa Rica

280. Nicaragua acknowledges in its Request for Provisional Measures that the situation in Central America

> "has already resulted in a *dangerous level of tension* not only between the United States and Nicaragua, but *between Nicaragua and Honduras and other Central American neighbors* that could have serious implications for

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upon the international responsibility of Albania", which was not a party to the case. The Court did not go forward, even though it was argued that Albania might have intervened, because Albania's legal interest "would *not only be affected* by a decision, but would form the very subject-matter of the decision" (*Monetary Gold, op. cit.*, at p. 32 (italics added)). Because the multilateral treaty reservation applies when the intervention standards have not been met, the reservation also applies, *a fortiori*, regardless of whether a State is "indispensable" for purposes of *Monetary Gold*.

[1] According to information that the United States received from the depositaries for each of the four multilateral treaties on which Nicaragua relies, each of the Central American States (Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua) is a party to the Charter of the United Nations (United States Department of State, *A List of Treaties and Other International Agreements of the United States in Force on January 1, 1984*, p. 301), the Charter of the Organization of American States (*ibid.*, p. 270), and the Convention on the Rights and Duties of States (*ibid.*, p. 290), and all the Central American States except Guatemala are parties to the Convention on the Rights and Duties of States in the Event of Civil Strife (*ibid.*, p. 290).

> international peace and security" (Request of the Republic of Nicaragua for Provisional Measures of Interim Protection, para. 9 (italics added)[1]).

281. Nicaragua supports its contention that there are tensions between itself and Honduras by specific allegations against Honduras. Nicaragua asserts that a "mercenary army[2]" created by the United States is "*recruited and trained in Honduras*", and installed in "*base camps in southern Honduras*" (Chronological Account, para. 5 (italics added)). Nicaragua further asserts that these "groups of armed men, *based in Honduras*" have carried out attacks on Nicaragua (*ibid.*, para. 1 (italics added)). Nicaragua contends that these forces "carry out hit-and-run attacks against targets inside Nicaragua, always returning to their *base camps in Honduras*" (*ibid.*, para. 6 (italics added)).

282. Nicaragua alleges that Honduras, in addition to making bases available, has assisted the United States in arming the "mercenaries" and transporting them into Nicaragua. According to Nicaragua, "arms and other military equipment were provided to this force by the United States *through Honduran military depots* . . ." (*ibid.*, para. 7 (italics added)). Nicaragua contends that "*Honduran armed forces*" have transported these forces to the Nicaragua-Honduras border (*ibid.*, para. 10 (italics added)).

283. Nicaragua also alleges that United States troops have carried out military maneuvers in Honduras, near the Nicaraguan border (*ibid.*, p. 2), that the United States and Honduras have carried out joint maneuvers in Honduras near the Nicaraguan border, and that "military equipment flown in for the joint maneuvers was turned over to the mercenaries . . ." (*ibid.*, para. 8). Furthermore, Nicaragua asserts that the United States and Honduras have conducted joint naval maneuvers (*ibid.*, para. 1) and that "mercenary" naval vessels "*[b]ased at the Honduran port* of San Lorenzo" have attacked Nicaraguan ports and facilities (*ibid.*, para. 22 (italics added)).

284. In the exhibits that Nicaragua submitted to this Court during the oral proceedings concerning Nicaragua's Request for Provisional Measures (25-27 April 1984), Nicaragua submitted as an exhibit a "draft treaty between the Republics of Honduras and Nicaragua". In the introduction to the draft treaty, Nicaragua claims to have proposed the treaty "with the objective of halting the rapid deterioration of relations caused by the continual attacks on [Nicaragua's] national territory and by the *increasing participation of the Armed Forces of Honduras* in counter-revolutionary activities that are *promoted by the Government of the United States* . . ." (Exhibit IX, p. 43 (italics added)[3]).

285. While Nicaragua has named only the United States as a party to this case, its allegations thus make clear that they are premised on actions that,

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[1] The President of the Court, in summarizing Nicaragua's Application at the beginning of oral proceedings on provisional measures, noted that the "Republic of Nicaragua . . . alleges a series of events over the period from March 1981 to the present date in Nicaragua, *in the neighbouring territory of Honduras*, and in the seas off the coasts of Nicaragua . . ." (**I**, p. 35 (italics added)).

[2] Nicaragua characterizes the forces opposed to the present Government of Nicaragua as "mercenaries" although those forces are made up of Nicaraguan nationals and therefore could not be "mercenaries" as that term is used in international law and practice. See Protocol I, Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Art. 47.

[3] Moreover, in an affidavit, Miguel d'Escoto Brockman, Foreign Minister of Nicaragua, asserts that Nicaragua had "initiated a dialogue with Honduras in an effort to terminate the flow of arms and attacks by armed bands in the border area" and blames Honduras for failed bilateral negotiations, maintaining that Honduras "unilaterally withdrew from the negotiations" (Exhibit II, para. 6).

according to Nicaragua, have been carried out in and by Honduras, together with the United States. The United States in no way addresses here the truth or falsity of Nicaragua's allegations. But it is clear, on the face of the allegations, that the Court could not conclude, for example, that the United States had exercised its rights to individual and collective self-defense without determining that Honduras had exercised the same rights.

286. Honduras itself has advised the Court that it could be profoundly affected by a decision in this case, if this Court were to grant the relief requested by Nicaragua:

> "[A] decision by the Court could affect the security of the people and the State of Honduras, which depends to a large extent on the bilateral and multilateral agreements on international cooperation . . . if such decision attempted to limit these agreements indirectly and unilaterally and thereby left my country defenseless[1]."

Honduras' own representation to the Court that a decision in this case would "affect" Honduras — in concrete and practical ways — is entitled to great weight[2].

287. Costa Rica is also a target of Nicaraguan allegations. Nicaragua argues that Costa Rica is involved, along with the United States, in specific actions on which Nicaragua bases its claims. Nicaragua has told the Court that there are 2,000 mercenaries on its southern border (Affidavit of Miguel d'Escoto Brockman, Exhibit II [submitted during oral proceedings on Provisional Measures], para. 5) and that "mercenary groups *originating from Costa Rican territory*" have engaged in attacks upon Nicaraguan territory (Affidavit of Luis Carrion, Nicaraguan Exhibit I (submitted during oral proceedings on Provisional Measures), para. 4 (italics added)). According to Nicaragua, mercenary forces have "received extensive support from *airplanes, helicopters* as well as *ships*, that all took off *from bases in Costa Rican territory*" (*ibid.* (italics added)).

288. Costa Rica, like Honduras, based solely on Nicaragua's own allegations, would therefore be affected by a decision of this Court as to whether or not the United States had unlawfully used force against Nicaragua. Nicaragua alleges that both of its immediate neighbors — Costa Rica and Honduras — have, together with the United States, permitted "mercenaries" to locate bases, ships and military vehicles in their territories. The Court cannot adjudicate Nicaragua's allegations against the United States without also passing upon the lawfulness of the actions in which Honduras and Costa Rica are alleged to be involved.

B. El Salvador Will Be Affected by a Decision of the Court on Nicaragua's Claims

289. As the United States has demonstrated in Part II of this Counter-Memorial, Nicaragua is currently engaged in an armed attack against El Salvador. This is evident from Nicaragua's own submissions. One of the exhibits submitted by Nicaragua at oral proceedings on provisional measures concludes:

> "A major portion of the arms and other material sent by Cuba and other Communist countries to the Salvadoran insurgents transits Nicaragua with the permission and assistance of the Sandinistas." (Exhibit V, Tab 10, p. 6.)

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[1] Ann. 104.

[2] This quotation from Honduras' letter makes patently clear the inaccuracy of Nicaragua's assertion that "Honduras does not claim: that it is one of the countries affected . . ." (Nicaraguan Memorial, para. 255).

This conclusion is supported by the statements of El Salvador's leaders[1], the Affidavit of Secretary of State Shultz (Ann. 1), and the findings of numerous bipartisan bodies in the United States that have had access to much relevant information.

290. Under Article 51 of the Charter of the United Nations, El Salvador has an inherent right of self-defence against such armed attacks and a right to request that the United States provide it with assistance in resisting such attacks. The United States presently does provide economic and military assistance to El Salvador, in accord with its rights and consistent with the Rio Treaty (see paras. 196, 203, *supra*).

291. Nicaragua requests the Court to determine that the United States must "cease and desist immediately . . . from all support of any kind . . . to any nation . . . engaged or planning to engage in military or paramilitary actions in or against Nicaragua" (Application, para. 26 *(g)*). If such relief is granted, El Salvador could, as a condition of further United States aid, be precluded from defending itself from Nicaraguan supported attacks on its territory. Thus, Nicaragua's Application — again, on its face — requests relief that would directly interfere with the legal rights and practical interests of a third State, El Salvador.

C. Grant of the Relief Requested by Nicaragua Would Directly Interfere with the Interests of the Other Central American States in the Contadora Process

292. As discussed in Part II of this Counter-Memorial, all of the Central American States, including Nicaragua, have agreed to negotiate region-wide problems in the Contadora process. Adjudicating and determining Nicaragua's claims in this Court would have an obvious adverse impact on the negotiations. Each of the other States has so advised the Court.

293. Thus, El Salvador has advised the Court that, as one of the parties to this dispute, it considers the Contadora process

> "as the *uniquely* appropriate forum . . . in which to seek a realistic, durable, regional peace settlement that would take into account the manifold legitimate interests of each participating State into full account[2]" (italics added).

El Salvador has told the Court explicitly that "the complaint by Nicaragua, if considered by the Court, would damage prospects for success of multilateral negotiations within the Contadora framework . . .[3]".

294. Honduras and Guatemala[4] also expressed concern that a decision of the Court in this case would interfere with sensitive multilateral negotiations being conducted under the auspices of the "Contadora countries". These negotiations are discussed in greater detail in Part II, Chapter IV, *supra*, and in Part IV, Chapter V, *infra*. And Costa Rica has expressed to the Court its views on Nicaragua's Application, noting that the

> "'case' presented by the Government of Nicaragua before the Court touches upon only one aspect of a more generalized conflict that involves other

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[1] President Duarte, in his recent inaugural address, stated that with "the aid of Marxist governments like Nicaragua, Cuba and Soviet Union, an army has been trained and armed and has invaded our homeland" (see para. 194, *supra*). Former President Magana noted that the guerrillas that operate in El Salvador are "supplied from Nicaragua and nowhere else but Nicaragua" (para. 193, *supra*).

[2] Ann. 103.

[3] *Ibid.*

[4] Anns. 104 (Honduras) and 105 (Guatemala).

countries within the Central American area as well as countries outside the region[1]".

295. All four of the Central American States that are not parties to this case have therefore taken the unusual step of coming forward to advise the Court of their concern that a decision by the Court in this case would affect them by interfering with and jeopardizing sensitive on-going multilateral negotiations that have the prospect of resolving the region-wide conflict in Central America.

D. The Multilateral Treaty Reservation Excludes Nicaragua's Application from the United States Consent to the Court's Jurisdiction because any Decision on Nicaragua's Claims Will Affect the Legal and Practical Interests of Honduras, Costa Rica and El Salvador

296. Even assuming the truth of Nicaragua's allegations, an issue that the United States does not address in this Counter-Memorial, Nicaragua's own submissions to this Court demonstrate that Nicaragua could not prove its allegations without requiring the Court to determine the legal rights and obligations of its Central American neighbors.

297. It is no answer to assert that the other Central American States would not be "affected" by a decision of the Court because, under Article 59 of the Court's Statute, only the United States would be bound by the Court's decision. To the contrary, as discussed in Section II, C, *supra*, it is precisely *because* of the concern that affected treaty parties would not be so bound that the United States added the multilateral treaty reservation to its declaration. If the Court were to grant the relief requested by Nicaragua, and were therefore to find, as Nicaragua requests, that the United States has a duty to cease "all support of any kind . . . to *any nation* . . . engaged in military and paramilitary actions against Nicaragua", the United States would be bound by the Court's decision, but the States that it is alleged to be supporting would be free to continue the very activities that the Court had determined to be violations of multilateral treaties. Such an untenable situation — in which two States would have differing obligations under a single multilateral convention with respect to the same dispute — is precisely the result that the multilateral treaty reservation was intended to prevent.

298. Moreover, adjudication of allegations against the other Central American States in a case to which only the United States and Nicaragua are parties unavoidably denies those States an opportunity to address Nicaragua's allegations. The Court cannot adjudicate the lawfulness of alleged United States assistance to other States in the region without passing judgment on whether those States are engaged in the lawful exercise of their inherent right of self-defense against Nicaragua's armed attacks. In addition, adjudication in the absence of other affected States would deprive the Court of a full and fair factual record, which could not be developed without their participation. Many of the key facts relating to Nicaragua's activities vis-à-vis the other Central American States are likely to be in the sole possession or control of those States. If the other Central American States are not before the Court, a decision of the Court would be based on incomplete evidence.

299. Part II of this Counter-Memorial, the Facts Relevant to Jurisdiction and Admissibility, underscores the complexity of the regional turmoil in Central America, and emphasizes the impossibility of this Court reaching a decision that does not affect the other Central American States. But the Court need not await

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[1] Ann. 102.

examination of the merits of Nicaragua's allegations to conclude that the multilateral treaty reservation precludes it from exercising jurisdiction over this case. Nicaragua's own submissions make clear that other Central American States would be affected by a decision of this Court. The Court's lack of jurisdiction over Nicaragua's Application under the United States multilateral treaty reservation is therefore clear.

Section IV. Nicaragua's Claims Styled as Violations of Customary and General International Law merely Restate Nicaragua's Treaty-Based Claims and Cannot, in any Event, Be Determined without Reference to those Treaties, in Particular the Charter of the United Nations

300. In addition to its contention that the United States "has breached express obligations under the Charter of the United Nations, the Charter of the Organization of American States and other multilateral treaties", Nicaragua asserts that the United States has "violated fundamental rules of general and customary international law . . ." (Application, para. 14). The United States will show that Nicaragua's allegations based on "general and customary" international law are no more than restatements of Nicaragua's assertions that the United States has violated the provisions of Article 2 of the Charter of the United Nations and the related provisions of the OAS Charter.

301. The United Nations Charter, moreover, subsumes and supervenes other sources of international law in this area. The United Nations Charter, in effect, *is* the "customary and general international law" with respect to questions concerning the lawfulness of the use of armed force. It is also the *lex inter partes* for the United States, Nicaragua and the other Central American States involved in the region-wide dispute. The Court will not, therefore, be able to consider Nicaragua's "customary and general international law" claims without interpreting, construing, and applying the multilateral treaties on which Nicaragua bases its principal claims, in particular the Charter of the United Nations. Since the multilateral treaty reservation specifies that the United States has not consented, under the circumstances of the present case, to adjudication of claims that require construction of multilateral treaties, Nicaragua's ostensibly "customary and general international law claims" are also excluded from the scope of United States consent to the Court's compulsory jurisdiction.

A. Nicaragua's Customary and General International Law Claims merely Restate Its Treaty-Based Claims

302. Nicaragua admits in its Memorial that its claims rest primarily on alleged violations of the Charters of the United Nations and the Organization of American States:

> "Nicaragua's *fundamental* contention is that the conduct of the United States . . . is a violation of the prohibitions on the use of force in the Charters of the United Nations and the Organization of American States." (Para. 193 (italics added).)

In fact, Nicaragua's "customary and general international law" claims against the United States do no more than paraphrase its allegations based expressly on these multilateral treaties[1].

303. The claims that Nicaragua bases expressly on multilateral treaties allege violations of three norms, contained in cited provisions of four multilateral treaties:

- the prohibition on the unlawful use of force, contained in Article 2 (4) of the United Nations Charter and Article 20 of the Charter of the Organization of American States[2];
- the prohibition on intervention in the internal affairs of other States, contained in Article 18 of the Charter of the Organization of American States and Article 8 of the Convention on Rights and Duties of States;
- Article 1, Third, of the Convention concerning the Duties and Rights of States in the Event of Civil Strife, which, it is alleged, obligates the United States "to forbid traffic in arms and war material to Nicaragua except when intended for the Government of Nicaragua" (Application, paras. 15-19).

304. Each of Nicaragua's "customary and general international law" allegations is directly subsumed by these allegations of violations of treaties, and, in particular, by the alleged violation of the norms in Article 2 of the United Nations Charter. Thus, Nicaragua's allegations that the United States has violated its obligations "not to use force or the threat of force" (*ibid.*, para. 21), not to "kill, wound or kidnap citizens of Nicaragua" (*ibid.*, para. 24), and "not to infringe the freedom of the high seas or interrupt peaceful maritime commerce" (*ibid.*, para. 23) are all no more than paraphrases of Nicaragua's allegation that the United States has violated the prohibition of Article 2 (4) of the United Nations Charter against the unlawful use of force and the related provision of Article 20 of the Charter of the Organization of American States. The allegation that the United States has violated its obligation "to respect the sovereignty of Nicaragua" (*ibid.*, para. 20) is also subsumed within the allegations expressly based on Article 2 (4), by Nicaragua's allegation that the United States has violated the principle of "sovereign equality of States" in the closely related provision of Article 2 (1)[3], and by Nicaragua's allegations with respect to unlawful intervention under Article 18 of the OAS Charter and Article 8 of the Convention on Rights and Duties of States.

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[1] In its Memorial, Nicaragua refers to the United States-Nicaragua Friendship, Commerce and Navigation Treaty (paras. 163-177), which is addressed in Part I, Chapter IV, *supra*. The Court's lack of jurisdiction over Nicaragua's claims arising under the Charters of the United Nations and the OAS is an additional reason for not adjudicating Nicaragua's claims based on the bilateral FCN. If the Court is not free to determine whether the alleged United States actions comport with the standards under the two Charters for the lawfulness of the use of armed force, it certainly should not attempt to evaluate the conformity of the alleged actions with the wholly irrelevant provisions of a bilateral commercial treaty.

[2] To the same effect, Nicaragua has alleged that, under Article 20 of the Charter of the Organization of American States, the United States is obligated not to "violate the territory of Nicaragua and not to subject it even temporarily to military occupation *or any other measures of force*, directly or indirectly, on any grounds whatsoever" (Application, para. 17 (italics added)).

[3] It is a "fundamental principle of the Charter that all States have the duty not to *threaten or use force against the sovereignty*, political independence or territorial integrity *of other States* . . ." (General Assembly resolution No. 36/103 (italics added)).

B. Nicaragua's "Evidence" of Customary International Law Consists of General Assembly Resolutions that merely Reiterate or Elucidate the Charter

305. Nicaragua supports its reliance on the existence of "general and customary international law" independent of the Charter by citing certain resolutions of the General Assembly (Application, para. 25). It is not necessary to address the legal nature, if any, of such resolutions *qua* General Assembly resolutions to reach the conclusion that none of them evidences some "general and customary international law" independent of the substantive and procedural norms established by the Charter of the United Nations. Indeed, the resolutions cited by Nicaragua expressly refer back to the Charter.

306. The first resolution relied on by Nicaragua is General Assembly resolution 36/103 of 9 December 1981, adopting the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States. That declaration sets forth a number of specific "rights and duties" of States and specifically declares that "[t]he rights and duties set out in this Declaration are interrelated and are in accordance with the Charter" (Declaration, para. 3), and that "[n]othing in this Declaration shall prejudice in any manner the provisions of the Charter" (*ibid.*, para. 5).

307. Second, Nicaragua cites resolution 3314 (XXIX), by which the General Assembly adopted the "Definition of Aggression". The Definition of Aggression and its relevance to the admissibility of the Application will be elaborated in greater detail in Part IV of this Counter-Memorial. It is sufficient for present purposes to refer to Article 6 of the Definition, which provides as follows:

> "Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful."

308. Nicaragua cites, third, resolution 2625 (XXV) of 24 October 1970, whereby the General Assembly adopted the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations". That Declaration is, by its own terms, not declaratory of "general and customary" international law independent of the provisions of the Charter, but rather reaffirms and elaborates the legal principles embodied in the Charter. This is made clear by the General Part of the Declaration, which provides in pertinent part as follows:

> "[The General Assembly] *[d]eclares* that:
>
> . . . .
>
> Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter of the United Nations or the rights and duties of Member States under the Charter . . . *taking into account the elaboration of these rights in this Declaration.*
>
> . . . .
>
> 3. *Declares further* that
>
> *The principles of the Charter which are embodied in this Declaration constitute basic principles of international law* . . ." (Italics added.)

309. The fourth resolution relied on in the Application is resolution 2225 (XXI) of 19 December 1966 on "The Status of the Implementation of the Declaration on the Intervention in the Domestic Affairs of States". This resolution constitutes little more than a reaffirmation of resolution 2131 (XX) of 21

December 1965 (discussed *infra*) and a call upon States "to carry out faithfully their obligations under the Charter of the United Nations . . .".

310. The fifth resolution cited by Nicaragua is resolution 2160 (XXI) of 30 November 1966 on the "Strict Observance of the Prohibition of the Threat or Use of Force in International Relations, and of the Right of Peoples to Self-Determination". That resolution constitutes an additional reaffirmation of the

> "fundamental obligations incumbent upon [States] in accordance with the Charter of the United Nations to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations . . .".

In other words, that resolution is a reaffirmation of the obligation imposed by Article 2 (4) of the Charter, rather than a declaration of the existence of some independent principle of international law. The intimate connection with the Charter is reinforced by a reminder to States in the resolution "to assist the Organization in discharging its responsibilities as assigned to it by the Charter for the maintenance of international peace and security".

311. Finally, Nicaragua cites resolution 2131 (XX) of 21 December 1965, whereby the General Assembly adopted a "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and Protection of Their Independence and Sovereignty". After reciting several declarations concerning the subject-matter, the declaration in paragraph 4 states:

> "The strict observance of these obligations is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates *the spirit and letter of the Charter of the United Nations* but also leads to the creation of situations which threaten international peace and security." (Italics added.)

312. Thus the General Assembly resolutions adduced in the Application for the proposition that there exists "general and customary international law" on the use of force independent of the Charter do not in fact establish that proposition but, rather, underscore the Charter as the source of law on such matters.

C. This Court cannot Determine the Merits of Nicaragua's "Customary and General International Law" Claims without Interpreting and Applying the United Nations Charter and the Charter of the Organization of American States

1. The provisions of the United Nations Charter relevant here subsume and supervene related principles of customary and general international law

313. Nicaragua's contention that there are "customary and general international law" bases for its claims apart from, and without reference to, the United Nations Charter is incorrect. All of Nicaragua's claims amount to no more than a paraphrase of the contention that the United States is unlawfully using armed force against Nicaragua. With respect to the lawfulness of the use of armed force by States, however, Article 2 (4) of the Charter *is* customary and general international law.

314. As the International Law Commission observed in 1966[1]:

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[1] As the Commission's statement indicates, there was a scholarly dispute as to whether customary international law was codified or created by Article 2 (4) of the Charter. Compare I. Brownlie, *International Law and the Use of Force by States*, p. 113 (1963), with

> "[W]hatever differences of opinion there may be about the state of the law prior to the establishment of the United Nations, the great majority of international lawyers today unhesitatingly hold that *article 2, paragraph 4,* together with other provisions of the Charter, *authoritatively declares the modern customary law regarding the threat or use of force* . . .[1]" (Italics added).

Although the formulations and theories sometimes differ, a broad range of scholars concurs. Professor Brownlie characterizes the principles of Article 2 as "general international law[2]". Professor Henkin calls Article 2 (4) a "universal norm[3]" and "the principal norm of contemporary international law[4]". The late Judge Baxter referred to the principles of Article 2 as "universal international law[5]". Similarly, Professor Tunkin called the obligatory principles of the Charter "universally recognized principles of international law[6]". Professor Verdross calls the principles of Article 2 (4) *jus cogens*[7], and, to the same effect, Lord McNair indicated that they have a: "semi-legislative character, with the result that member States cannot 'contract out of' or derogate from them by treaties made between them . . .[8]".

315. Numerous other authorities could be cited. It is sufficient here to note that Nicaragua's counsel agreed with this position during the hearing on preliminary measures:

> "It requires no citation of authority to show that the use of force by one State against another . . . is a violation of general international law. Indeed, it is generally considered by publicists that *Article 2 (4) of the United Nations Charter is* in this respect *an embodiment of existing general principles of international law.*" (**I**, p. 59 (italics added).)

316. This Court, moreover, has recognized that a norm-creating provision of a multilateral treaty can embody customary international law, when such a provision —

> "has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris,* so as to become binding even for countries which have never,

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A. Verdross, "Idées directrices de l'Organisation des Nations Unies", 83 *Recueil des cours,* Vol. II, p. 1, at p. 12 (1953). But, as the Commission further indicates, that dispute is now wholly academic.

[1] *1966 Yearbook of the International Law Commission,* Vol. II, p. 247 (italics added).

[2] I. Brownlie, *International Law and the Use of Force by States,* p. 113 and n. 4 (1963).

[3] L. Henkin, "International Law and the Behaviour of Nations", 114 *Recueil des cours,* Vol. I, p. 171, at p. 225 (1965). To the same effect is Professor Sørenson, who observes that Article 2 (4) is:

> "l'exemple d'une disposition conventionnelle qui produit des effets *erga omnes* car elle formule un principe qui correspond à une conviction juridique universelle" (M. Sørenson, "Principes de droit international public", 101 *Recueil des cours,* Vol. II, p. 5, at p. 236 (1960)).

[4] L. Henkin, *How Nations Behave,* p. 129 (1968).

[5] R. Baxter, "Treaties and Custom", 129 *Recueil des cours,* Vol. I, p. 31, at p. 71 (1970).

[6] G. Tunkin, "Coexistence and International Law", 95 *Recueil des cours,* Vol. I, p. 1, at p. 5 (1958). In this regard, Professor Tunkin makes particular reference to Article 2 (3) and (4).

[7] A. Verdross, "*Jus Dispositivum* and *Jus Cogens* in International Law", 60 *American Journal of International Law,* p. 55, at p. 60 (1966).

[8] A. McNair, *The Law of Treaties,* p. 217 (1961).

> and do not, become parties to the [treaty in question]. [This] constitutes indeed one of the recognized methods by which new rules of customary international law may be formed". (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 4, at p. 42.)

And the Court has recognized that the Charter is a multilateral treaty of the character that creates customary international law (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at pp. 180-185).

317. In sum, the provisions of Article 2 (4) with respect to the lawfulness of the use of force *are* "modern customary law" (International Law Commission, *loc. cit.*) and the "embodiment of general principles of international law" (Counsel for Nicaragua, **I**, p. 62). There is no other "customary and general international law" on which Nicaragua can rest its claims.

318. This conclusion should surprise no one. Because of the pre-eminent status of the Charter of the United Nations in this area, subsequent State practice has necessarily evolved only by reference to the Charter. When addressing allegations of an unlawful use of force, States have analysed the legal aspects of such allegations in light of Article 2 (4). As one commentator observes:

> "The principle contained in [Article 2 (4)] has become a customary rule of international law. Numerous declarations by states, the interpretations which they adopt when problems regarding the use of force arise, and the explanations which they submit whenever accused of unlawful employment of force bear witness to the acceptance of the view that Article 2 (4), besides being part of the law of the United Nations, is a principle of law that governs the relations of all states[1]".

319. It is, in short, inconceivable that this Court could consider the lawfulness of an alleged use of armed force without referring to the principal source of the relevant international law — Article 2 (4) of the United Nations Charter.

2. *The various multilateral treaties on which Nicaragua bases its claims are the applicable law among Nicaragua, the United States and the other Central American States*

320. Nicaragua, the United States, and the other four Central American States are all parties to each of the four multilateral treaties on which Nicaragua bases its claims, most notably the Charters of the United Nations and the Organization of American States. Regardless of the status of the Charter of the United Nations as customary and general international law, those treaties constitute the *lex inter partes*, and Nicaragua's claims cannot be adjudicated by referring to some other, unagreed sources of law.

321. Article 38 (1) of the Statute of the Court directs the Court in applying international law to look first to "international conventions, whether general or particular, establishing rules expressly recognized by the contesting States". Sir Hersch Lauterpacht explained why the Statute requires the Court to apply conventional law before any other source:

> "The order in which the sources of international law are enumerated in the Statute of the International Court of Justice is, essentially, in accordance

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[1] K. Skubiszewski, "Use of Force by State. Collective Security. Law of War and Neutrality", in M. Sørenson (ed.), *Manual of Public International Law*, p. 739, at p. 745 (1968).

> both with correct legal principles and with the character of international law as a body of rules based on consent to a degree higher than is law within the State. The rights and duties of States are determined, in the first instance, by their agreement as expressed in treaties — just as in the case of individuals their rights are specifically determined by any contract which is binding upon them. When a controversy arises between two or more States with regard to a matter regulated by a treaty, it is natural that the parties should invoke and that the adjudicating agency should apply, in the first instance, the provisions of the treaty in question. Like a contract between individuals, a treaty between States constitutes the law between them. *Modus et conventio vincunt legem*[1]".

Lauterpacht continues that "[i]t is only when there are no provisions of a treaty applicable to the situation that international customary law is, next in hierarchical order, properly resorted to" ("Sources of International Law", *op. cit.*, p. 87). These conclusions are virtually axiomatic[2].

322. In sum, just as Nicaragua's claims allegedly based on "customary and general international law" cannot be determined without recourse to the United Nations Charter as the principal source of that law, they also cannot be determined without reference to the "particular international law" established by multilateral conventions in force among the parties. Since the multilateral treaty reservation bars adjudication of claims based on those treaties, it bars all of Nicaragua's claims.

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[1] H. Lauterpacht, "Sources of International Law", in E. Lauterpacht (ed.), *International Law, Being the Collected Papers of Hersch Lauterpacht*, Vol. I, p. 51, at pp. 86-87 (1970).

[2] See, e.g., W. W. Bishop, *International Law, Cases and Materials*, p. 31, note (2nd ed., 1962).

CHAPTER III

THE UNITED STATES CONSENT TO THIS COURT'S JURISDICTION OVER NICARAGUA'S APPLICATION AND THE CLAIMS CONTAINED THEREIN IS SUSPENDED FOR A PERIOD OF TWO YEARS BY VIRTUE OF THE MODIFICATION OF THE UNITED STATES DECLARATION EFFECTED BY THE NOTE OF 6 APRIL 1984

323. The United States demonstrates in Chapter II of this Part and Part IV *infra* that it did not consent in its original 1946 declaration to this Court's adjudication of the claims set forth in Nicaragua's Application. Even were it assumed, *arguendo*, that jurisdiction over Nicaragua's claims came within the terms of the original 1946 declaration, the United States, in a note signed by the Secretary of State and filed with the Secretary-General of the United Nations on 6 April 1984, effected a valid modification temporarily suspending the consent of the United States to the adjudication of those claims. Nicaragua's Application did not, accordingly, come within the scope of the United States declaration in effect on the date the Court became seized of the case and hence does not come within the compulsory jurisdiction of the Court.

Section I. The United States Declaration Excludes Nicaragua's Claims from the United States Consent to the Court's Compulsory Jurisdiction because those Claims (1) Present a "Dispute with a Central American State" and (2) "Arise out of or Are Related to Events in Central America"

324. On 6 April 1984, the United States Secretary of State, in accordance with Article 36 (4) of the Court's Statute, sent the Secretary-General of the United Nations a note with respect to the United States 1946 declaration which read in pertinent part:

> "The Declaration shall not apply to disputes with any Central American State or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree.
>
> Notwithstanding the terms of the aforesaid Declaration, this proviso shall take effect immediately and shall remain in force for two years, so as to foster the continued regional dispute settlement process which seeks a negotiated solution to the interrelated political, economic and security problems of Central America." (Ann. 108.)

325. Nicaragua's Application, filed on 9 April 1984, falls squarely within the terms of the United States declaration as thus modified in two respects. First, it presents a "dispute with a Central American State". Second, it "arises out of" and is "related to events in Central America".

326. The purpose of the United States in thus temporarily qualifying its consent to the Court's compulsory jurisdiction was set out in both the 6 April note itself and in a Department of State statement of 8 April 1984 (Ann. 109). The United States believed that Nicaragua's anticipated allegations could not be severed from the inter-related security, political, economic and other issues

comprised by the negotiating agenda of the Contadora process, nor, in particular, from the rights of Nicaragua's neighbors to take appropriate measures, including the solicitation of assistance from the United States, in resisting Nicaraguan aggression against them.

327. All of the Central American States, including Nicaragua, have agreed to the Contadora process, which has been endorsed by the Security Council and the Organization of American States, and has the active support of the United States, as discussed in Part II, *supra*. The Contadora process is thus a means for definitively resolving pending disputes in the Central American region "in such manner as the parties to them may agree", consistent with the 6 April note.

328. The United States was concerned that it would jeopardize the objectives agreed upon in the Contadora process to sever selective security issues of concern to Nicaragua for adjudication at this time in isolation from the security concerns of the other States and from other directly related regional issues. That this is not the view solely of the United States is demonstrated by the communications to the Court and other statements from Nicaragua's neighbors and co-participants in the Contadora process, entered into the record during oral argument in April of 1984 (see Anns. 102, 103, 104 and 105).

329. The United States wished to act promptly to preserve the integrity of the regional peace process and to defeat the possibility of a tactical filing of an Application by Nicaragua, but the United States could not anticipate the precise manner or nature of a Nicaraguan Application. The United States thus was not in a position to assess the potential effectiveness of alternative arguments relating to jurisdiction and admissibility in meeting such a contingency. It was in these circumstances that the United States took the precaution of depositing the note of 6 April[1]. In the event, the Nicaraguan Application and Memorial present several fatal jurisdictional and admissibility defects, addressed in this Counter-Memorial.

330. As a result of the 6 April note, there can be no question that, when Nicaragua's Application was filed and the Court was seized of Nicaragua's claims on 9 April 1984, the United States did *not* consent to this Court's adjudication of those claims.

Section II. The 6 April Note Effected a Modification Temporarily Suspending in Part the Operation of the United States Declaration Accepting the Court's Compulsory Jurisdiction; It Did not Terminate that Declaration

331. The modification to the United States declaration effected by the note of 6 April was carefully delimited in both time and geography. The consent of the United States to this Court's compulsory jurisdiction was modified only with respect to certain disputes, relating to Central America. The modification effected by the United States 6 April note, moreover, is not only partial, but also temporary. *Ceteris paribus*, the *status quo ante* will, by its own terms, be restored on the expiration of the modification. The United States consent to the Court's compulsory jurisdiction as set forth in the 1946 declaration was not otherwise

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[1] For example, the 6 April note was intended to protect the regional process by preventing Nicaragua from subsequently attempting to cure its lack of effective acceptance of compulsory jurisdiction by depositing a new declaration, and then filing, or re-filing, an Application.

modified or suspended and remains in effect. The note is without prejudice in any respect to the possible recourse to the Court that may be incorporated into any agreement resulting from or complementary to current efforts to resolve the complex of problems affecting the Central American region.

332. The United States 6 April note was thus a modification in the nature of a temporary, partial suspension of the operation of the United States acceptance of this Court's compulsory jurisdiction. It was *not* a termination of the United States 1946 declaration in terms or intention. Nicaragua accepts this as the preferable characterization of the 6 April note (Nicaraguan Memorial, para. 137; **I**, pp. 74-75.)

333. Nicaragua, however, despite its stated preference, attempts to characterize the 6 April note in the alternative as a termination of the 1946 declaration and a substitution of a new declaration therefor. (Memorial, para. 102 (ii)). This construction is inconsistent with the purpose of the note as set forth in the statement of 8 April and logically incompatible with the terms of the note. The 6 April note only purports to *suspend* the operation of the 1946 declaration with respect to a limited category of claims and thus *defers* any adjudication relating to such category for a period of two years. Nicaragua's alternative argument implies that the Court should deem the United States action to constitute an implausibly complex sequence of events, entailing a termination of the original declaration, a substitution of a new declaration, and an automatic resubstitution of the original in two years.

334. The technical distinctions between a limited action in the nature of a suspension and a termination are well understood in treaty law[1]. The partial suspension of the operation of the 1946 declaration was effected in this case by a modification[2] of the declaration. It thus is also important to note the difference between modification and termination of a declaration of acceptance of the compulsory jurisdiction of the Court. Professor Bourquin addressed the distinction in his arguments on behalf of Portugal in the *Right of Passage over Indian Territory* case:

> "La dénonciation met fin en totalité à l'engagement. La réserve portugaise, s'il en était fait usage, aurait simplement pour effet de réduire le champ d'application de cet engagement.
>
> Quelle différence y a-t-il entre une réduction de ce genre et une dénonciation totale?
>
> On peut soutenir qu'au point de vue de la technique juridique, les deux opérations diffèrent de nature. Nous sommes en présence ici, en réalité, d'une clause de revision et non d'une clause de dénonciation.
>
> Mais pratiquement, la seule différence qui existe entre elles est une différence de degré, une différence de quantité. La libération, si je puis ainsi dire, est plus complète dans un cas que dans l'autre.

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[1] Judge Dillard noted the distinction with respect to treaty law in the *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 46, sep. op., p. 50, at p. 102, where he wrote that "the concept of 'suspension' which is clearly keyed to a temporary condition, presupposes the continued existence of the treaty". See also Sir Humphrey Waldock, "Second Report on the Law of Treaties", 1963 *Yearbook of the International Law Commission*, Vol. II, p. 71. Termination of a treaty entails the total extinction of the obligation (C. Rousseau, *Droit international public*, Vol. I, 212 (1970)).

[2] The term "modification" is used herein interchangeably with the concepts of "revision", "alteration" and "amendment", with respect to declarations under the Optional Clause.

> L'Etat qui dénonce sa déclaration se libère de tout engagement. Il répudie toute obligation en ce qui concerne la juridiction de la Cour.
>
> Si le Portugal usait du droit qu'il s'est réservé, il resterait soumis à certaines obligations. Il continuerait à reconnaître, dans certaines limites, la juridiction obligatoire de la Cour. Ces limites seraient plus étroites que précédemment, mais elles laisseraient subsister un domaine de juridiction obligatoire." (*I.C.J. Pleadings*, Vol. IV, pp. 138-139.)

Later in the same argument Professor Bourquin stated:

> "Quelle différence y a-t-il entre les deux cas? C'est que dans le premier — celui de la dénonciation —, l'obligation prendrait fin complètement; tandis que, dans le second — celui de la revision —, elle ne prendrait fin que partiellement. Elle serait simplement restreinte, au lieu d'être anéantie." (*Loc. cit.*, p. 254.)

335. The Court accepted this distinction between modification and termination, noting that modification of a subsisting declaration affords reciprocal benefits to other States in an adjudication (just as Nicaragua could now protect itself from an Application from the United States by invocation of the 6 April qualification). The Court found "no essential difference" between the level of uncertainty in the Optional Clause system caused by the right of termination on notice and that entailed by a right of modification on notice, and noted the equivalent practical results where either right is invoked with the intention of effecting a revision of the terms of acceptance of compulsory jurisdiction; these conclusions, however, did not affect the Court's confirmation of their fundamentally distinguishable functions and purposes (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, pp. 142-144).

336. The distinction between a modification and a termination must be similarly respected in this case, particularly since the modification results in but a temporary suspension of the operation of the declaration. The distinction is important since the 1946 declaration speaks to termination procedure but not to modification.

Section III. The 6 April Note Validly Modified the United States 1946 Declaration with Immediate Effect

337. Nicaragua does not dispute that its claims come squarely within the terms of the 6 April note (Memorial, paras. 102 *et seq.*). Nicaragua argues, rather, that the note was not legally effective. Nicaragua's contention that the United States 1946 declaration did not reserve a right of modification and therefore could not validly be modified in any respect will be examined in this Section.

A. Declarations under the Optional Clause Are Subject to Modification at the Discretion of the Declarant State in any Manner not Inconsistent with the Statute at any Time until an Application Has Been Filed with the Court

1. Declarations are sui generis *in character; they are not treaties and are not governed by the law of treaties*

338. Nicaragua's contentions as to the modifiability of declarations under the Optional Clause misconstrue in several important respects the nature and effect

of such declarations. Declarations are *not* treaties. On this, both Applicant and Respondent would appear to be in agreement (see Nicaraguan Memorial, paras. 115 and 157). Nicaragua nevertheless seeks mechanically to apply to the modification or termination of declarations rigid rules which it contends should be derived from the law of treaties (*ibid.*, paras. 118 and 119). This leap is not warranted.

339. The law and practice of this Court make clear that declarations are *not* subject to the law of treaties. They are unilateral instruments. Their terms and reservations are not negotiated on a bilateral basis nor are they subject to the procedures for establishing bilateral obligations under a multilateral treaty. The unilateral character of declarations must be taken into account when assessing the conditions under which they may be modified. Modern State practice under the Optional Clause, the opinions of this Court, and the opinions of leading publicists, all indicate that declarations become binding between any two declarant States only when the Court is seized by the filing of an Application. State practice demonstrates that declarations are, accordingly, inherently modifiable up to the date the Application is filed.

(a) *It is incompatible with the terms of Article 36 of the Statute of the Court to regard declarations as treaties*

340. Article 36 (1) of the Statute of this Court vests the Court with jurisdiction over matters "specially provided for" in "treaties or conventions in force". If declarations under paragraph (2) of Article 36 constituted "treaties or conventions", that paragraph would simply be redundant to paragraph (1).

341. This was recognized in the *South West Africa* cases by Judges Spender and Fitzmaurice. After reviewing the International Law Commission's then recent definition of a "treaty" as meaning "any international agreement . . . concluded between two or more States", they observed:

> "It will be seen that this concept of what constitutes a treaty, though wide, is not a limitless one. A declaration containing a unilateral assumption of obligations would not be an international agreement at all, since an international agreement must be concluded between 'two or more' parties.
>
> The quasi-treaty character which 'optional clause' declarations made under paragraph 2 of Article 36 of the Statute are sometimes said to possess, would arise solely from the multiplicity of these declarations and their interlocking character, which gives them a bilateral or multilateral aspect. A single such declaration, if it stood quite alone, could not be an international agreement. Optional clause declarations are clearly not covered by the words 'treaties or conventions' in paragraph 1 of Article 36, or there would have been no need for paragraph 2, except perhaps for reasons of convenience or emphasis. If a State making a declaration of willingness to accept the jurisdiction of the Court compulsorily for certain classes of disputes were held thereby to have entered into a treaty or convention, a dispute of the class specified would rank as a matter 'specially provided for' in 'treaties or conventions in force' within the meaning of paragraph 1." (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319, diss. op., Spender, J. and Fitzmaurice, J., p. 465 at pp. 475-476.)

See Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-4; Questions of Jurisdiction, Competence and Procedure", 34 *British Year Book of International Law*, page 1, at pages 74-76 (1958); D. W. Bowett, "Reservations to Non-Restricted Multilateral Treaties", 48 *British Year Book of International Law*, page 67, at page 76, n. 3 (1976-1977).

(b) *Declarations differ fundamentally from treaties in the unilateral nature of their formation*

342. This Court early declined an invitation to construe a declaration as if it were a treaty, like the Statute of the Court itself, in the *Anglo-Iranian Oil Co.* case; the Court deemed it inappropriate to adopt, as it would have in the case of a treaty, a literal or "grammatical" interpretation of the Iranian declaration (*Anglo-Iranian Oil Co., Judgment, I.C.J. Reports 1952*, p. 93, at pp. 104-105). See Dubisson, *La Cour internationale de Justice*, page 104 (1964), and C. De Visscher, *Problèmes d'interprétation judiciaire en droit international public*, pages 202-203 (1963). The Court noted a fundamental distinction between treaties and declarations because of the unilateral nature of the generation of declarations:

> ". . . the text of the Iranian Declaration is not a treaty text resulting from negotiations between two or more States. It is the result of unilateral drafting by the Government of Iran." (*Anglo-Iranian Oil Co., Judgment, I.C.J. Reports 1952*, p. 93, at p. 105.)

See also the Permanent Court's description of a declaration as a "unilateral act", *Phosphates in Morocco, Judgment, 1938* (*P.C.I.J., Series A/B, No. 74*, p. 10 at p. 23); *Certain Norwegian Loans, Judgment* (*I.C.J. Reports 1957*, p. 9, at pp. 23-24); and *Barcelona Traction, Light and Power Company Limited, Preliminary Objections, Judgment* (*I.C.J. Reports 1964*, p. 6, at p. 29).

343. The eminent Indian scholar R. Anand states that "[t]he making of a declaration is a unilateral act, entirely in the discretion of a state, which becomes a bilateral agreement only when an application is filed with the Court" (*Compulsory Jurisdiction of the International Court of Justice*, p. 147 (1961)). Other publicists also stress the unilateral nature of the creation of declarations. (See De Visscher, *loc. cit.*; J. L. Iglesias Buigues, "Les déclarations d'acceptation de la juridiction obligatoire de la Cour internationale de Justice: leur nature et leur interprétation", 23 *Österreichische Zeitschrift für Öffentliches Recht*, p. 255, at pp. 257-259, 262-263 (1972); J. Charpentier, "Affaire de la Barcelona Traction", 10 *Annuaire français de droit international*, p. 327, at pp. 343-344 (1964); Rosenne, *The Time Factor*, pp. 26-27; B. Maus, *Les réserves dans les déclarations d'acceptation de la juridiction obligatoire de la Cour internationale de Justice*, pp. 57-59 (1959); and Dubisson, *op. cit.*, at pp. 192-194.) Dubisson thus succinctly concludes with respect to declarations that "les règles d'interprétation qui s'appliquent généralement en matière de traités doivent ... être écartées" (*ibid.*, p. 193).

(c) *Declarations differ fundamentally from treaties in the treatment of reservations*[1]

344. The conclusion that declarations are not treaties and are not governed by the law of treaties also flows necessarily from the manner of treatment of

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[1] "Reservation" in this regard is generally construed broadly to encompass any form of condition to a declaration. See, e.g., Briggs, "Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice", 93 *Recueil des cours*, p. 223, at p. 230 (1958). The terms "reservation", "condition", "proviso", "limitation" and "qualification" are used interchangeably in this Counter-Memorial with respect to the terms of declarations.

conditions or reservations placed upon them. As former President of the Court Jiménez de Aréchaga observed:

> "These declarations [under Article 36 (2)] are often accompanied by limitations or conditions which are commonly described as 'reservations'.
>
> It is questionable, however, whether these conditions are strictly reservations within the meaning given to this term in treaty law, particularly in the Vienna Convention. One of the essential features of treaty reservations is that the other parties are given an opportunity to take a position on them, either accepting or rejecting them. This is not the case of the so-called reservations to the acceptance of the optional clause. In the *Rights of Passage over Indian Territory* case the Court reached the conclusion that declarations under Article 36 (2), including the reservations attached to them, have immediate legal effects, '*ipso facto* and without special agreement' [*ICJ Reports 1957*, p. 146] vis-à-vis the other parties having made a declaration, even before they received the text and consequently without giving them any opportunity to take a position on those reservations. It follows that there can be no element of tacit consent by silence to the reservations unilaterally attached to each individual declaration.
>
> The so-called reservations to the optional clause are based on a different legal principle: '*in plus stat minus*'. If any party to the Statute is allowed to remain totally apart from the system of the optional clause, then a party must be permitted to accept only partially the Court's jurisdiction by subordinating its acceptance to certain conditions or limitations.
>
> It results from this principle that the régime of 'reservations' allowed under the optional clause has to be by its very nature more liberal and less restrictive than the discipline of reservations which may be agreed by the parties to a treaty providing for compulsory jurisdiction of the Court." ("International Law in the Past Third of a Century", *Recueil des cours*, Vol. 159, p. 1, at p. 154 (1978).)

345. Professor Crawford similarly observes that there is:

> "a material difference between treaty reservations and reservations in Optional Clause declarations. In the former case there is a single agreed text: both conceptually and temporally the reservation is subsequent to agreement on the content of the treaty from which it derogates. In the case of the Optional Clause, since it is established that reservations can be freely made, there simply is no prior agreement: the reservation is an integral part of the act which constitutes the agreement. The better view would seem to be that the applicability of treaty reservation rules cannot be settled by abstract analysis of the nature of Optional Clause declarations; rather, the question is to what extent those rules have been applied in practice, by other States and by the Court itself." ("The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court", 50 *British Year Book of International Law*, p. 63, at p. 77 (1979).)

Crawford then examines relevant State practice and holdings of the Court and concludes that "treaty reservation rules are not applicable here" (*ibid.*, p. 79; also see Maus, *op. cit.*, pp. 93-95).

346. The treatment of reservations or conditions to declarations under the practice of this Court, particularly open-ended rights to make further modifications as approved in the *Right of Passage* case, clearly has not been governed by the rules set out in Articles 19 to 23 of the Vienna Convention (Crawford, *op. cit.*, p. 79).

(d) *The right of unilateral modification of declarations sanctioned by the* Right of Passage *case is alien to treaty law*

347. The Court sanctioned in the *Right of Passage over Indian Territory* case, discussed more fully below in Subsection 3 *(b)*, the incorporation in declarations of a reservation of a right to vary their conditions at will until the date of seisin, without prior notice to or the consent of other members of the Optional Clause system. Such a result is perfectly compatible with the object and purposes of the system, but is not analogous to treaty practice. The revision, amendment or modification of treaties can be accomplished only by the express agreement of some or all of the parties, by the implementation of rules laid down in the instrument itself, or by procedures of an international organization under whose auspices the treaty was concluded and is monitored. See D. P. O'Connell, *International Law*, Volume I, page 278 (1970); A. McNair, *op. cit.*, pages 534-535 (1961); T. O. Elias, *The Modern Law of Treaties*, pages 88-100 (1974); and E. De La Guardia and M. Delpech, *El Derecho de Los Tratados y La Convención de Viena*, pages 354-362 (1970).

348. Modification of declarations as thus sanctioned by this Court cannot be accommodated to the rules regarding amendment and modification of treaties in the Vienna Convention (Arts. 39-41).

(e) *Publicists generally concur that declarations are* sui generis

349. Because it is internally inconsistent with the terms of Article 36 of the Statute of the Court to regard the relationship created under Article 36 (2) as a treaty; because the Court has recognized the unilateral nature of declarations; and because the complex system of reservations to and modifications of declarations has not been governed by the law of treaties, the consensus of modern scholarship is that declarations create legal relationships that are *sui generis*. See, for example, Waldock, "Decline of the Optional Clause", 32 *British Year Book of International Law*, page 254 (1955-1956); Iglesias Buigues, *op. cit.*, pages 257-258; Crawford, *op. cit.*, page 76; Maus, *op. cit.*, pages 59-62; and Nicaraguan Memorial, paragraph 111.

350. As Dr. Shihata rightly observes in his examination of the Court's jurisprudence, there are unilateral, bilateral and multilateral elements to declarations. Which of those elements should be emphasized depends on the specific issue presented (*The Power of the International Court to Determine Its Own Jurisdiction*, p. 147 (1965)). Rules of treaty interpretation are thus not directly transferable to this hybrid legal system. Professor Crawford concluded after an exhaustive examination of all Court opinions discussing declarations:

> "[I]t is significant that the Court has not applied to declarations under the Optional Clause rules of treaty interpretation as such; rather, such principles are extended by analogy, or similar principles are generated independently of their application to treaties." (*Op. cit.*, p. 76; see also, Rosenne, *Law and Practice of the Court*, Vol. I, pp. 405-409 (1965).)

351. The issue here is whether a declaration is subject to modification *before* an Application is filed. The United States will show that State practice and decisions of this Court indicate that until an Application is filed, at which time seisin occurs, the unilateral element of the system of declarations predominates, and a declaration may be modified, whether or not the right to modify has been expressly reserved. Once the Court is seized of a case by Application, how-

ever, the bilateral element of the two declarations becomes predominant, and the States become bound to each other by the terms of their declarations then in effect, subject to the rule of reciprocity.

2. *A State's sovereign right to qualify its acceptance of the Court's Compulsory Jurisdiction is an inherent feature of the Optional Clause System, as reflected in, and developed by, State practice*

(a) *The system of reservations to declarations is based not on the Court's Statute but on State practice*

352. Article 36 of the Statute of the Permanent Court, on which Article 36 of the Statute of the present Court is closely modelled, did not expressly provide for reservations to declarations. The drafters of the Statute of the Permanent Court appear to have contemplated, rather, that States would specify in their declarations which of four enumerated categories of legal disputes would come within the scope of the declarant's acceptance[1].

353. Despite the absence of textual authority, States almost immediately began qualifying their declarations with a wide range of reservations. Indeed, the League of Nations expressly encouraged the process[2]. This combination of State practice and League sanction firmly established a right on the part of declarant States to enter reservations to their declarations under the Optional Clause system of the Permanent Court. Sir Humphrey Waldock is typical of commentators in observing that

> "it was a recognized interpretation of the Statute that *States had an inherent right to qualify their acceptance* of the Court's jurisdiction under the Optional Clause by limitations, reservations, and conditions" (*op. cit.*, pp. 248-249 (italics added)).

Many commentators have noted that this development of the right of reservation was entirely a matter of State practice. See, for example, Hambro, "Some Observations on the Jurisdiction of the International Court of Justice", *Recueil des cours*, Volume I, page 125, at page 183 (1950); Shihata, *op. cit.*, page 153; Crawford, *op. cit.*, page 79; and Maus, *op. cit.*, at pages 12-23, and pages 86-90.

354. When this practice has come before the Permanent Court and the present Court, such reservations or conditions have been accepted, without exception, beginning with the *Phosphates in Morocco* case, *Judgment, 1938, P.C.I.J., Series A/B, No. 74*, page 10, at pages 21-24. See J. Merrills, "The Optional Clause Today", 56 *British Year Book of International Law*, page 87, at page 89 (1979).

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[1] See discussion in Waldock, *op. cit.*, p. 257. Article 36 of the Permanent Court's Statute also indicated (in terms on which the present Article 36 (3) is based) that States could make declarations "unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time". This provision contemplated limitations on a declaration *ratione temporis* and, further, permitted a State to condition the coming into force of its declaration on the agreement of other States to be similarly bound. Reservations were not otherwise intended to be sanctioned. See *infra*, at para. 406.

[2] See League of Nations docs., *Records of Fifth Assembly, Committees, III*, at pp. 198-199 (1924); *ibid., Plenary*, p. 225 (resolution of October 2, 1924); *Records of Ninth Assembly, Plenary*, p. 183 (resolution of Sep. 26, 1928). See also M. Hudson, *op. cit.*, pp. 467-468 (1943); and Rosenne, *The International Court of Justice*, pp. 310-311 (1957).

355. The principal reason for the evolution of this right was to reconcile the political realities of State sovereignty with promotion of the availability of the adjudicatory mechanism of the Court. The promotion of use of the Court is necessarily linked to the flexibility afforded States in fashioning their current acceptances in light of changing conditions. As Sir Humphrey Waldock observed:

> "In the old Statute wide freedom of choice was deliberately left to the individual State in order to make it as easy as possible for States to subscribe to compulsory jurisdiction under the [Optional] Clause[1]."

356. During the drafting of the present Court's Statute, it was proposed to amend Article 36 to make explicit the right of reservation. This was expressly rejected as unnecessary (see, *UNCIO*, Vol. XIII, pp. 391-392). Article 36 of the present Statute does not treat the question of reservations any more extensively than did its predecessor, and the understanding of its framers was that Article 36 permits reservations[2].

(b) *A right to qualify acceptance of the Court's compulsory jurisdiction necessarily derives from the consensual basis of jurisdiction and the principle* in plus stat minus

357. The drafters of the Statute of this Court deliberately determined that the Court's jurisdiction should *not* be compulsory. States are free to accept it as they choose and to the extent they choose. The right to limit the scope of acceptance derives not from the terms of the Statute but from a principle implicit in the consensual nature of the Court's jurisdiction and in the political reality that, if sovereign States are to accept the Court's jurisdiction, they must be free to limit that acceptance. To repeat the view of former President Jiménez de Aréchaga:

> "The so-called reservations to the optional clause are based on . . . '*in plus stat minus*'. If any party to the Statute is allowed to remain totally apart from the system of the optional clause, then a party must be permitted to accept only partially the Court's jurisdiction by subordinating its acceptance to certain conditions or limitations." (*Op. cit.*, p. 154.)

As Sir Arnold (later Lord) McNair observed:

> "The machinery provided . . . is that of 'contracting-in' not of 'contracting-out'. A State, being free either to make a Declaration or not, is entitled, if it decides to make one, to limit the scope of its Declaration in any way it chooses, subject always to reciprocity. Another State seeking to found the jurisdiction of the Court upon it must shew that the Declarations of both States concur in comprising the dispute in question within their scope . . . when the [applicant] filed its Application." (*Anglo Iranian Oil Co., Judgment, I.C.J. Reports 1952*, p. 28, McNair, J., sep. op., p. 116.)

358. Thus, this Court's compulsory jurisdiction, no less than other bases for

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[1] *Op. cit.*, p. 247. See also, e.g., Hambro, *op. cit.*, at p. 183; and Hudson, *op. cit.*, pp. 452-453.

[2] See discussion in Crawford, *op. cit.*, at p. 79; Shihata, *op. cit.*, at p. 153; Waldock, *op. cit.*, at p. 248; and Maus, *op. cit.*, at pp. 20-23.

its jurisdiction, is founded on the consent of the parties. Sir Gerald Fitzmaurice explained that compulsory jurisdiction is —

> "compulsory in the sense that once a dispute of the class covered arises, the jurisdiction of the Court is automatic, and the parties are obliged to submit to it, if either of them invokes it. As this is precisely the situation that each party has, in effect, agreed to be placed in, the jurisdiction is just as much based on consent as if the consent had been given *ad hoc*." ("The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure", *op. cit.*, at p. 74, n. 2; also see pp. 66 ff.)

359. The commentators, and the statements issuing from this Court, invariably stress the "voluntary" and "unilateral" nature of the political decision to adhere to the Optional Clause system. See, for example, individual opinion of President McNair, *loc. cit.*; dissenting opinion of Judge Hackworth in the *Anglo-Iranian Oil Co.* case, *I.C.J. Reports 1952*, pages 139-140; and observations of P. De Visscher, 1957 *Annuaire de l'Institut de droit international*, Volume I, page 313, at page 321[1]. A corollary of this freedom to "contract in" is the right of the State to "limit the scope of its Declaration in any way it chooses, subject always to reciprocity" (McNair, J., *loc. cit.*).

360. Professor Bourquin elaborated on this fundamental feature of the Optional Clause system during oral argument in the *Right of Passage over Indian Territory* case:

> "Il n'est sans doute pas superflu de rappeler ... qu'aucun Etat n'est obligé de faire usage de la disposition de l'article 36 permettant aux Etats d'accepter d'avance, dans certaines conditions, la juridiction de la Cour.
>
> Etant libres de ne pas y souscrire, les Etats sont également libres, quand ils le font, de limiter le champ de leurs obligations.
>
> Les auteurs du Statut ont voulu, tout le monde le sait, encourager l'acceptation de la juridiction de la Cour, et, pour obtenir ce résultat, ils ont donné au système une grande souplesse.
>
> . . . .
>
> Quelles sont donc les limites qui circonscrivent leur liberté? Elles sont inscrites dans le Statut lui-même. C'est le Statut de la Cour, et lui seul, qui les prescrit.
>
> Pour établir que la réserve portugaise serait entachée de nullité, le Gouvernement de l'Inde devrait donc démontrer que cette réserve est incompatible avec telle ou telle disposition du Statut. Aussi longtemps qu'il n'administre pas cette preuve, sa prétention ne peut pas être admise. La liberté qui est laissée, en principe, aux Etats de déterminer la portée de leur engagement, cette liberté doit être respectée." (*Op. cit.*, Vol. IV, p. 135.)

Sir Hersch Lauterpacht, generally a critic of reservations to the Court's compulsory jurisdiction, also acknowledged that

> "in accepting the jurisdiction of the Court Governments are free to limit its jurisdiction in a drastic manner . . . [T]heir right to append reservations

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[1] "C'est précisément dans la mesure où les Etats resteront conscients du caractère volontaire de cette compétence que l'on peut espérer les voir souscrire à la clause facultative de juridiction obligatoire." *(Loc. cit.)*

which are not inconsistent with the Statute is no longer in question." (*Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, p. 9, sep. op., p. 34, at p. 46; also see Maus, *op. cit.*, at pp. 90-91.)

361. By definition, a decision of a State to remain outside the Optional Clause system altogether, or to join it under specified conditions excluding certain categories of cases or imposing other qualifications, is a decision to avoid adjudication in whole or part. Such decisions by States are intrinsically political (see J. Merrills, "The Justiciability of International Disputes", 47 *Canadian Bar Review*, p. 241 (1969)). Certainly, there is no issue of "good faith" raised by such decisions; this is an inherent feature of the Optional Clause system itself. Consistent with Article 33 of the Charter, a decision to refer all or certain categories of dispute to non-adjudicatory means of settlement can hardly be presumed to be impermissible. Twenty-six States maintain reservations in their declarations which expressly address deference to other means of settlement in specified classes of cases[1].

(c) *Reserved rights to modify declarations, or to terminate declarations and substitute new declarations therefor with immediate effect, dominate the present-day Optional Clause system*

362. From the outset of the Optional Clause régime of the Permanent Court, certain States made declarations for a specified number of years, terminable thereafter upon notice. In 1940 the Union of South Africa made a new declaration that, from the outset, was to remain in force only "until notice of termination is given" (*P.C.I.J. Annual Report 1939-1945, Series E, No. 16*, p. 326)[2]. This practice has become even more common under the Optional Clause régime of the present Court. Of the 46[3] declarations currently in effect, 22 have expressly reserved the right to terminate on notice[4].

363. In 1955, Portugal made a declaration, the third condition of which reads as follows:

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[1] See e.g., Australia (". . . this declaration does not apply to any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other methods of peaceful settlement"); Canada, para. (2) *(a)*, and (2) *(b)* which excludes "disputes with the Government of any other country which is a member of the Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree"; India ("disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement"); Japan, which excludes disputes "which are not settled by some other means of dispute settlement"; United Kingdom, para. (i), subpara. *(a)* of which excludes disputes which the United Kingdom "has agreed with the other Party or Parties thereto to settle by some other method of peaceful settlement" *(I.C.J. Yearbook 1982-1983)*. The note of 6 April refers to "disputes [which] shall be settled in such manner as the parties to them may agree". The 1946 United States declaration contained a proviso based on Article 95 of the United Nations Charter ("disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future"), discussed *infra*, para. 400, second note; the declarations of two other States contain similar language modelled on Article 95 *(ibid.)*.

[2] Practice under the Permanent Court is described in Waldock, *op. cit.*, pp. 268-269.

[3] This figure excludes Nicaragua's ineffective declaration.

[4] Australia, Austria, Barbados, Belgium, Canada, Democratic Kampuchea, Gambia, India, Israel, Japan, Kenya, Liberia, Malta, Mauritius, Pakistan, Philippines, Portugal, Somalia, Sudan, Swaziland, Togo and United Kingdom.

> "The Portuguese Government reserves the right to exclude from the scope of the present declaration, at any time during its validity, any given category or categories of disputes, by notifying the Secretary-General of the United Nations and with effect from the moment of such notification." (*I.C.J. Yearbook 1982-1983*, pp. 82-83.)

Fifteen of the declarations currently in effect have followed Portugal's lead, in whole or in part, and reserved the right to modify with immediate effect[1].

364. Of the 46 declarations now in effect, only 19 are not expressly subject to either unilateral termination or modification on notice[2,3]. Seven of these 19, moreover, are dated acceptances of the Permanent Court's jurisdiction that are now recognized as being terminable on notice[4].

(d) *States have exercised their right to modify a declaration to avoid prospective adjudication*

365. States have on numerous occasions exercised reserved rights to terminate on notice existing declarations and substitute therefor new declarations of narrower scope[5]. On at least six occasions, changes in the scope of a State's consent have been effected through this means with the specific intention of avoiding adjudication of matters that came within the scope of the previous declaration and, in several cases, of avoiding the filing of an Application in a particular pending dispute. Thus, in 1954, in order to avoid a Japanese application to determine rights to pearl fisheries off the Australian coast, Australia narrowed the scope of its acceptance of the Optional Clause (see Waldock, *op. cit.*, pp. 267-268). In the following year, the United Kingdom *twice* terminated its existing declaration and made a new, narrower declaration in order to avoid possible adjudication of a dispute involving Saudi Arabia (*ibid.*; and Merrills, "The Optional Clause Today", *op. cit.*, at p. 94). In 1970 Canada declared an anti-pollution zone extending 100 miles into its Arctic waters and promptly amended its declaration to exclude any related disputes (see statement of Prime Minister Trudeau to Canadian House of Commons, H.C. Deb. (Canada), 8 April 1970, pp. 5623-5624). In two other instances, after an Application was brought,

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[1] Australia, Botswana, Canada, El Salvador, Kenya, Malawi, Malta, Mauritius, New Zealand (limited), Norway (limited), Portugal, Somalia, Swaziland, Togo and United Kingdom.

[2] Of the 22 declarations with immediate rights of termination, 10 also have reserved rights to immediate modification. Five declarations which have reserved rights of immediate modification do not contain express rights of immediate termination.

[3] The most recent declaration accepting the Court's compulsory jurisdiction, that of the Togolese Republic, did so subject to the following proviso:

> "The present declaration has been made for an unlimited period subject to the power of denunciation and modification attached to any obligation assumed by a sovereign State in its international relations." (*I.C.J. Yearbook 1982-1983*, pp. 86-87.)

[4] See discussion at paras. 408 *et seq.*, *infra*.

[5] For example: Australia (6 Feb. 1954); Canada (7 Apr. 1970); France (10 July 1959 and 20 May 1966); India (18 Sep. 1974); Philippines (18 Jan. 1972); South Africa (13 Sep. 1955); United Kingdom (2 June 1955, 31 Oct. 1955, 18 Apr. 1957 and 26 Nov. 1958). See Rosenne, *Documents on the International Court of Justice* (hereafter "*Documents*"), 2nd ed., pp. 345-416 (1979).

declarations were terminated and a new declaration substituted with protective modifications to exclude the subject-matter of the pending Application from any subsequent filings (see Waldock, *op. cit.*, p. 268; Merrills, "The Optional Clause Today", *op. cit.*, at 93-94). Quite properly, in neither case was the termination of the former declaration invoked to attempt to divest the Court of jurisdiction in respect of the Application previously filed. These modifications appear to have been motivated by the desire to prevent future Applications should jurisdictional defenses to the pending Application have succeeded; in other cases, the same motivation has prompted the termination of acceptance *(ibid.)*.

366. The process of terminating or modifying an existing declaration pursuant to a reserved right to do so with an intent to avoid adjudication of particular matters, and in certain instances, with specific States, is thus firmly established in Court practice. None of the actions discussed *supra* provoked protests by other States[1].

(e) *States have modified or terminated their declarations in the absence of a reserved right*

367. Because most States have expressly reserved the right to terminate or modify their declarations on notice, the number of instances where States have modified or terminated their declarations in the absence of an express reservation of a right to do so is consequently limited. Nevertheless, States have effectively done so on at least five occasions prior to the action taken by the United States on 6 April.

368. Colombia made a declaration accepting the Permanent Court's compulsory jurisdiction in 1932, which reserved no right to modify or terminate the terms of its acceptance (117 *LNTS*, p. 47). In 1936, however, Colombia modified that declaration to exclude matters arising prior to 1932 (*Thirteenth Annual Report of the P.C.I.J., 1936-1937*, at pp. 276-277). The following year, without provoking any objections, Colombia filed a new declaration incorporating the 1936 modification (181 *LNTS*, p. 347; *I.C.J. Yearbook 1982-1983*, p. 61).

369. In 1938 Paraguay denounced its declaration, which (like Nicaragua's) was unconditional on its face. Paraguay evidently wished to avoid an Application by Bolivia with respect to the Chaco dispute (Waldock, *op. cit.*, at p. 263). Six States objected to Paraguay's denunciation[2]. The Court's early *Yearbooks* continued to list Paraguay among the States accepting the Court's compulsory jurisdiction but (as in the case of Nicaragua) indicated in a footnote that there was some question in this regard. (See, e.g., *I.C.J. Yearbook 1946-1947*, p. 211. See also Waldock, *op. cit.*, p. 246.) Since the 1959-1960 *Yearbook*, however, Paraguay has not been listed; the Court's Registry has indicated that "the omission was not inadvertent" (see Shihata, *op. cit.*, p. 167, n. 1). There has been no objection to the removal of Paraguay from the *Yearbook*.

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[1] For good reason, the subject-matter of the instant Application is without parallel in these examples; the unprecedented nature of the case is in itself a reflection of its inadmissibility, discussed *infra* in Part IV.

[2] The incident is discussed in Fachiri, "Repudiation of the Optional Clause", 20 *British Year Book of International Law*, p. 52 (1939). It is interesting to note that all six of the States (Brazil, Belgium, Bolivia, Czechoslovakia, the Netherlands and Sweden) that objected to Paraguay's action had made declarations that were terminable on notice after the expiration of fixed periods.

370. In 1939, France, the United Kingdom and five other Commonwealth States amended their declarations, which were for specified periods that had not yet expired, to exclude disputes arising out of events occurring during World War II (see *League of Nations Official Journal*, 20th Ass. (1939), pp. 407-410; *ibid.*, 21st Ass. (1940), p. 44). Eleven States objected to these modifications made in the absence of a reserved right (*P.C.I.J. Annual Report 1939-1945, Series E, No. 16*, pp. 333-343). Nevertheless, these actions have been approved consistently by subsequent commentators[1].

371. El Salvador accepted the compulsory jurisdiction of the Permanent Court in 1921 without reserving the right to modify or terminate the declaration. In 1973, citing the need "to accord . . . with present circumstances", El Salvador replaced the 1921 declaration with a new declaration (*I.C.J. Yearbook 1982-1983*, pp. 64-65). Honduras, in a letter submitted to the Secretary-General of the United Nations on 21 June 1974, objected that "a declaration not containing a time-limit cannot be denounced, modified or broadened unless the right to do so is expressly reserved in the original declaration" (Rosenne, *Documents*, p. 363, quoting C.N.144.1974.TREATIES-2, of 5 Aug. 1974). The Government of El Salvador responded that such a contention "completely lacks any basis or support in international law". El Salvador observed:

> "To seek to apply to such declarations of acceptance of compulsory jurisdiction the provisions of the general law of treaties, is to go beyond the reality of the law and international practice on the subject.
>
> To accept the contentions of Honduras would be tantamount to accepting that all those States which had made declarations with time-limits or with reservations would be in a privileged position vis-à-vis all those other States which had made declarations for an indefinite term or without reservations." (*Ibid.*, p. 368, quoting C.N.251.1974.TREATIES-3, of 9 Oct. 1974.)

372. On 28 February 1984, Israel notified the Secretary-General of two modifications to the declaration it had deposited on 17 October 1956 (C.N.41. 1984.TREATIES-1, of 23 March 1984). The previous declaration contained a provision for denunciation on notice, but had reserved no right of modification (*I.C.J. Yearbook 1982-1983*, pp. 69-70).

373. It is notable from this history that objections to Paraguay's 1938 denunciation and to the modifications at the time of World War II were limited. There was but a single objection to the Salvadoran action in 1973. There were no objections to the Colombian modification, to the dropping of Paraguay from the *Yearbook*, nor, to date, with respect to the two modifications this year (Nicaragua's contentions in the present case, of course, excepted). The current *Yearbook* reproduces the modified El Salvadoran and Colombian declarations without qualification as to their effectiveness.

374. This record thus lends no credence to Nicaragua's bold assertion that "the practice of States provides no support for the view that Declarations can be terminated or modified at will" (Nicaraguan Memorial, para. 132). The record, on the contrary, demonstrates general acquiescence by States in this

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[1] See, e.g., Waldock, *op. cit.*, p. 265. Note that the French, United Kingdom and Commonwealth country communications, while describing the circumstances justifying their actions, do not themselves articulate legal conclusions therefrom in support of the modifications, whether based on Optional Clause practice, or treaty or other legal principles.

practice[1]. Moreover, the disposition — or, rather, non-disposition — of those few objections that have been registered over the years underscores how far removed the Optional Clause system is from a formal treaty context with its rules on reservations and objections[2].

3. The Court has confirmed the evolution of State practice with respect to declarations, and has recognized an inherent, extra-statutory right to modify declarations in any manner not inconsistent with the Statute at any time until the date of filing of an Application

(a) *The date for determining jurisdiction is the date of seisin, which is the date of filing of an application with the Court*

375. Because of the consensual nature of the Court's contentious jurisdiction, and because each State accepting the Court's compulsory jurisdiction pursuant to Article 36 (2) of the Statute does so only with respect to other States accepting "the same obligation", it has long been recognized that "the Declarations of both States [must] concur in comprising the dispute in question within their scope" (*Anglo-Iranian Oil Co., Judgment, I.C.J. Reports 1952*, p. 93, Sir Arnold McNair, J., sep. op., p. 116). It is, however, necessary to determine as of what date the declarations must concur[3].

376. The Court specifically addressed this issue in the *Right of Passage over Indian Territory* case. India, on the ground that it rendered uncertain the scope of Portugal's consent to jurisdiction, had challenged Portugal's reserved right to exclude categories of disputes from its declaration. The Court rejected India's contention:

> "When a case is submitted to the Court, it is always possible to ascertain what are, *at that moment*, the reciprocal obligations of the parties in accordance with their respective Declarations." (*Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 125, at p. 143 (italics added).)

377. The Court's holding in the *Right of Passage over Indian Territory* case, moreover, is consistent with the Court's jurisdictional determinations in earlier cases, which were invariably made as of the date of filing of the Application. Sir Percy Spender and Sir Gerald Fitzmaurice described the key event as "the date when the Court is seized of the case by Application, this being the date when all the elements necessary to give the Court jurisdiction must be present" (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319, jt. diss. op., p. 495).

378. Events affecting the scope or validity of the parties' declarations have been given effect by the Court if they precede the filing of an Application. Events subsequent to the filing have not been given effect. Thus, the expiry of a dec-

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[1] See Rosenne, *The Time Factor*, *op. cit.*, p. 24, n. 2.

[2] Note that the Court, in upholding the Portuguese third condition in the *Right of Passage* case, discussed in the following subsection, did not refer at all to the Swedish objection which had been lodged against that condition. The Swedish objection appears to be the only recorded objection to the substance of a reservation in a subsequently deposited declaration (see Crawford, *op. cit.*, at p. 77).

[3] Sir Arnold considered that the critical date in that case was "when the United Kingdom filed its Application in this Court on 26 May, 1951" *(op. cit.)*.

laration before the date of filing has properly been viewed as precluding jurisdiction[1].

379. Conversely, the expiry or denunciation of a declaration *after* an Application has been filed has been held not to divest the Court of jurisdiction. In the *Nottebohm* case, Guatemala's declaration expired shortly after proceedings had been instituted, and Guatemala argued that this expiration divested the Court of any jurisdiction it may have had on the date of filing. The Court rejected this argument unanimously:

> "*At the time when the Application was filed*, the Declarations of Guatemala and of Liechtenstein were both in force. The regularity of the seising of the Court by this Application has not been disputed. The subsequent lapse of the Declaration of Guatemala, by reason of the expiry of the period for which it was subscribed, cannot invalidate the Application if the latter was regular: consequently, the lapse of the Declaration cannot deprive the Court of the jurisdiction which resulted from the combined application of Article 36 of the Statute and the two Declarations." (*Preliminary Objection, Judgment, I.C.J. Reports 1953*, pp. 122-123 (italics added)[2].)

380. Professor Briggs summarized the rule from the cases thus:

> "[I]t is not the date of deposit of a new Declaration which constitutes the crucial date for purposes of the jurisdictional requirement of reciprocity, but the date on which an Application is filed." (*Op. cit.*, pp. 262-263.)

He continued that:

> ". . . Declarations are made unilaterally by States and can in practice be limited by reservations, conditions, and exclusions not inconsistent with the Statute of the Court . . .
>
> The critical date for establishing whether two Declarations coincide in conferring jurisdiction and for determining their common ground is the date on which an Application is filed with the Court. *Although a consensual bond accepting compulsory jurisdiction exists between two declarant States as from the time of entry into force of the later Declaration and permits the filing of an Application as from that date, it is not necessary that 'the same obligation' be irrevocably fixed at the time the consensual bond is established.*" (*Ibid.*, p. 267. (Italics added).)

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[1] In the *Pajzs, Csáky, Esterházy* case, Hungary attempted to invoke the compulsory jurisdiction of the Court although Yugoslavia's declaration had expired a few days before Hungary's Application was filed (*Order of 23 May 1936, P.C.I.J., Series A/B, No. 66*, p. 36). At the proceedings on the merits, Hungary withdrew that jurisdictional contention, admitting that the expiry of Yugoslavia's declaration caused that title of jurisdiction to lapse:

> "[T]he Hungarian Government . . . no longer relies in the present case on the third of the clauses adduced by it as conferring jurisdiction on the Court, namely the Optional Clause of Article 36 of the Court's Statute, in view of the fact that Yugoslavia's acceptance of that Clause expired while the Application was in process of drafting, a few days before it was filed, and has so far not been renewed." (*Pajzs, Csáky, Esterházy, Judgment, 1936, P.C.I.J., Series A/B, No. 68*, p. 41. The Court acceded to this position. *Ibid.*, p. 65.)

[2] Expiry or denunciation of declarations subsequent to the filing of an Application was not invoked as a ground for objection to jurisdiction in *Losinger, Order of 27 June 1936, P.C.I.J., Series A/B, No. 67*, p. 15; *Phosphates in Morocco, Judgment, supra; Anglo-Iranian Oil Co., supra*; and *Right of Passage over Indian Territory, supra;* see discussion in Rosenne, *Law and Practice of the Court*, Vol. I, at pp. 501-506; and Shihata, *op. cit.*, p. 164.

381. Other scholars concur. In perhaps the most exhaustive examination of the Court's jurisprudence, Professor Rosenne has concluded as follows:

> "When a State deposits a declaration under Article 36 (2) of the Statute, it makes a general offer to all other States doing likewise, to recognize as defendant the jurisdiction of the Court in a future concrete case, and on the terms specified . . . The terms upon which that offer is made are not constant, but consist in the area of coincidence with the terms of like declarations made, or to be made, by other States . . . There is, as yet, no element of direct agreement between any of the States making declarations. That agreement will only come about when a legal dispute is concretized by the filing of an application. That step alone sets the process of compulsory adjudication in motion." (*Law and Practice of the Court*, Vol. I, pp. 413-414.)

382. Another thorough analysis of the Court's jurisdiction arrives at similar conclusions:

> "[E]ven in [the realm of theory] the insistence on applying the rules relating to the termination of treaties, and therefore of invalidating any unilateral termination not anticipated in the instrument, is not always justified. It has been explained before that the 'bilateral element' is not the only element in the relationship created by the declarations of acceptance, and that this element becomes particularly important only after the seisin of the Court of a given case. All agree that a unilateral termination will then have no effect on the Court's jurisdiction. Before the Court is seized, however, the vague relationship between each two declaring states, with its three elements [unilateral, bilateral, and multilateral] present, can hardly be called a treaty subject to the rules governing the termination of treaties. If the application of such rules is found 'desirable' as it results in widening the Court's scope of continued jurisdiction, it may at best be suggested as an instance of the 'should be' as compared with the 'is' in the realm of international adjudication." (Shihata, *op. cit.*, pp. 167-168.)

Likewise, Julius Stone observes that —

> "[t]he distinction 'compulsory'-'voluntary' is only accurate when the matter is regarded *as at the moment after a dispute has arisen, and when one party seeks to invoke the Court.* As at that moment, and as regards the other disputant, the Court's jurisdiction is said to be 'compulsory' if the dispute is within the class of disputes which it has already agreed to submit; it is 'voluntary' if, there being no such prior agreement, the other party then agrees to submit the particular dispute. In both situations, the Court has jurisdiction because, and only because, the parties have so agreed." (*Legal Controls of International Conflict*, p. 123 (1957) (italics in original).)

383. Thus, the date of the filing of an Application is critical in distinguishing between commitments under the Optional Clause system that retain, before that date, a variable and unilateral character, but become fixed for the purposes of any given case on that date. The jurisprudence with respect to the seisin of the Court constitutes yet another demonstration of the divergence between the law of treaties and practice under the Optional Clause.

(b) *Declarant States have an inherent right to modify their acceptances of the Court's compulsory jurisdiction at any time until the filing of an application*

384. In the case concerning ***Right of Passage over Indian Territory***, the Court affirmed that a right of modification at will is compatible with the Optional Clause. The focus of the controversy over the terms of adherence to the Optional Clause was the third condition of Portugal's 1955 declaration (text, *supra*, at para. 363). Close scrutiny of the arguments and the holding in the *Right of Passage* case is pertinent since the right asserted by the United States in the instant case is in every respect equivalent to that asserted by Portugal, including the source of the right, with the sole exception that Portugal had *expressly* reserved this right in its declaration.

385. The *Right of Passage* case is also germane because the attack on the third condition by Sir Humphrey Waldock on behalf of India[1] made, *inter alia*, the same points as does Nicaragua now in its Memorial. Sir Humphrey Waldock argued that Portugal's condition or reservation was "an abuse of the Optional Clause". The posited inherent right of modification, he contended, was an illusory and variable acceptance of jurisdiction that fundamentally defeated the idea that jurisdiction was "compulsory"; the system would be depleted of contractual operation and effect; impermissible elements of retroactivity would be introduced, which conflicted with the Court's powers under Article 36 (6) of the Statute; and the Portuguese condition, equally with the circumstances of its declaration and immediate filing of the case against India, demonstrated "opportunistic" political tactical purposes from which other declarants should be "protected". (Compare paras. 125 and 131 of the Nicaraguan Memorial with Sir Humphrey Waldock's argument, *I.C.J. Pleadings, op. cit.*, at pp. 27-30, 45-49.)

386. The Court approached the third condition from two key premises: (1) that the critical date of the seisin of the Court, as demonstrated *supra*, is the date of the filing of an Application; and (2) that only modifications in clear conflict with the Statute are impermissible[2] (*I.C.J. Reports 1957*, pp. 142-144).

387. The Court accepted that the Optional Clause system contains an inherent degree of uncertainty in the scope of each declarant's acceptance of compulsory jurisdiction at any given time. Although the Court posited a contractual relationship between declarant States as from the date of the later of their declarations (*ibid.*, p. 146), the Court indicated that this is a relationship the scope and extent of which is variable at all times until the date of an Application (*ibid.*, p. 143). On that date, all the elements of jurisdiction expressed in the declarations of the parties then in force, as well as rights of further modification or termination, are effectively frozen in respect of that case. The Court found such a system retained its vital compulsory and contractual character, while affording States the flexibility that lies at the heart of the consensual nature of the Article 36 (2) régime (see *supra*, at paras. 357 *et seq.*). In upholding the validity of the third condition, the Court observed:

> "While it must be admitted that clauses such as the Third Condition bring about a degree of uncertainty as to the future action of the accepting government, that uncertainty does not attach to the position actually established by the Declaration of Acceptance or as it might be established in consequence of recourse to the Third Condition.

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[1] Sir Humphrey thus brought directly before the Court the arguments he had made in the "Decline of the Optional Clause" *(op. cit.)*.

[2] *Cf.* argument of Professor Bourquin, quoted *supra*, at para. 360.

> As Declarations, and their alterations, made under Article 36 must be deposited with the Secretary-General, it follows that, *when a case is submitted to the Court, it is always possible to ascertain what are, at that moment, the reciprocal obligations of the Parties in accordance with their respective Declarations.*" (*Ibid.*, p. 143 (italics added).)

388. The Court further concluded that the third condition injected no more uncertainty into the operation of the Optional Clause system than rights of denunciation at will (a feature of both the Portuguese and Indian declarations) (*ibid.*, pp. 143-144). The practical affinities between termination and modification where States, like India, had exercised a termination right in order to substitute a new, modified declaration, had been emphasized by Professor Bourquin, arguing for Portugal (*I.C.J. Pleadings, supra*, at pp. 138-140) (see *supra*, para. 334).

389. The Court, having articulated this conception of the operation of the Optional Clause system, briefly disposed of the argument that the third condition deprived India of the benefits of the principle of reciprocity; at the date of filing of an Application, the right of reciprocity would attach to all conditional elements notified by that date pursuant to the third condition (*ibid.*, p. 144). With respect to arguments of retroactivity, the Court found that "construed in their ordinary sense, these words mean simply that a notification under the third condition applies only to disputes brought before the Court after the date of the notification", thus raising no conflict with Article 36 (6) and the rule in the *Nottebohm* case (*ibid.*, p. 142).

> "It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it." (*Ibid.*)

390. Thus the Court considered and rejected the concerns of Sir Humphrey Waldock and other commentators who argued that the evolution of extensive rights of modification in State practice was inconsistent with the Statute and would undermine the Optional Clause system (*I.C.J. Pleadings, op. cit.*, pp. 28 and 30). The Court confirmed that, in the absence of a direct conflict with the Statute, the fundamental changes in the Optional Clause system being wrought by State practice must be upheld.

4. *Denial of a right of modification to a State not making an express reservation in an older declaration would be inequitable and cannot be justified in light of the fundamental changes which have occurred in State practice under the Optional Clause*

(a) *The inherent right asserted by the United States is fully consistent with the nature and operation of declarations accepting compulsory jurisdiction as articulated by this Court in the* Right of Passage *case*

391. The United States submits that, contrary to the arguments advanced by Nicaragua in its Memorial, express confirmation by this Court of prior practice premised on an inherent right to modify declarations represents no departure in theory, in operation, or in practical result, from the inherent right to reserve such a modification power sanctioned by the Court in the *Right of Passage* case.

392. It is incumbent on Nicaragua, given the broad evolution of State practice in respect of modifications, to demonstrate that failure to express in a declaration the inherent right of modification upheld in the *Right of Passage* case raises, in

itself, an issue of violation of the terms of the Statute. Nicaragua has failed to bear this burden and cannot do so since there is no credible legal basis on which to distinguish the origin and purpose of the Portuguese reservation sustained in *Right of Passage* from the right which has been invoked by the United States and other States.

393. No aspect of the United States modification is in conflict with the Statute. The United States modification must be interpreted "as producing and as intended to produce effects in accordance with existing law" (*I.C.J. Reports 1957*, p. 142). Contrary to Nicaragua's assertions (Memorial, para. 131), there is no element of retroactivity in the United States action; the terms of the note of 6 April are purely prospective. It preceded the date of filing of the Application in this case. The rule of the *Nottebohm* and *Right of Passage* cases is that a *subsequent* change in the content or status of a declaration will be ineffective. This rule as easily governs exercise of an inherent right of modification as a right expressly reserved in a declaration.

394. Confirmation of an inherent right to modify creates no level of uncertainty greater than that inherent in the Optional Clause system and accepted by the Court in the *Right of Passage* case. On the date of seisin, when a case is actually submitted, the terms and conditions attaching to any acceptance of the Court's compulsory jurisdiction can be ascertained as of that date. Neither effect nor reciprocity could be given to a term or condition not then express and deposited with the Secretary-General pursuant to Article 36 (4) of the Statute. A declaration subject to an inherent right of modification is therefore no more uncertain as to the subsisting reciprocal rights and obligations it encompasses, no more "variable" or "illusory" with respect to acceptance of compulsory jurisdiction, than one of the many now subject to an express modification right or to a right of unilateral termination[1].

395. The right claimed by the United States implies no violation of rights of equality or reciprocity to which States are entitled under the Optional Clause régime, for the same reasons adduced by this Court in the *Right of Passage* case. As the Court made clear, the "same obligation" in terms of Article 36 (2) need not be defined at the time of deposit of a declaration for the entire period of its effectiveness (*I.C.J. Reports 1957*, p. 144).

396. Reciprocity fully applies with respect to temporal and substantive aspects of a declaration, such as they may be on the date of an Application; Nicaragua is clearly entitled to invoke the United States declaration as modified on 6 April in any case that the United States might now bring against Nicaragua. There is no difference in result under the *Right of Passage* analysis whether variation in terms prior to the date of seisin results from an express or implied right to modify[2].

397. There can be no distinction between the cases in terms of motive or purpose. The Court sanctioned, in *Right of Passage*, aggressive tactics, which, whatever their novelty, were not impermissible under the Statute; the Court did not distinguish rights of modification or termination which were challenged as means of avoiding adjudication in the future (see *I.C.J. Reports 1957*, p. 143;

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[1] Indefinite reservations regarding substantive and temporal conditions having been consistently applied by the Court as being permissible under the Statute, *a fortiori* a temporary qualification in the nature of a partial suspension of the operation of a declaration, such as that effected by the United States on 6 April, is indistinguishably permissible.

[2] Nor does the United States argue for a right of modification denied to Nicaragua; as argued *infra*, at paras. 408 *et seq.*, Nicaragua's declaration, perpetual on its face, is in fact terminable, and thus modifiable, at will. Considerations of equality, mutuality and reciprocity require that Nicaragua's arguments be weighed against its own ambiguous

and *I.C.J. Pleadings, op. cit.*, Vol. IV, at pp. 27-28, and 45-46). As discussed *supra*, at paragraphs 357 *et seq.*, decisions to accept or decline the jurisdiction of the Court are inherently political. In the instances cited *supra*, paragraphs 365 *et seq.*, States have modified existing declarations precisely to avoid adjudication of particular disputes with other specific States, without challenge. No issue of "good faith" arises where, as here, alternative means of dispute resolution consistent with Article 33 of the Charter are available, have been invoked, and are clearly not exhausted.

398. Finally, the only basis on which to require that the inherent right of modification of declarations be expressly reserved in the declaration would be application, not of the Statute, but rather of formal rules derived from the law of treaties. As has been demonstrated *supra*, at paragraphs 338 *et seq.*, however, declarations under the Optional Clause are not treaties; the reservations attaching to declarations are not handled in a manner in any way analogous to that applicable to treaties; and the modifiability of declarations, confirmed by this Court in the *Right of Passage* case, cannot be assimilated to treaty law rules on amendment or modification. The *Right of Passage* case assumes the existence of a legal undertaking *sui generis*, resistant to mechanical application of concepts derived from the law of treaties. Here, the line drawn by such an application would be artificial and formalistic. Since in substance the position of the United States does not differ from that of Portugal in the *Right of Passage* case, reliance on treaty law concepts is inapposite[1].

(b) *It would be inequitable to treat States unequally with respect to the right of modification by failing to interpret older declarations, like that of the United States, in light of the fundamental changes in the optional clause system that have been brought about by State practice*

399. The United States has demonstrated that no distinction between the right to reserve the power of modification sanctioned in the *Right of Passage* case and a similar, but unexpressed, right of modification is required by law, logic, operation of the Optional Clause system or practical results. The concept of an inherent right of modification can be accommodated easily within the framework articulated by that case. The Court has yet to impose any limits on the powers of reservation to and modification of declarations, other than that such actions be consistent with the Statute. The United States believes that the Court should

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record regarding its status before the Court; just as this record would have permitted Nicaragua, as respondent in a case it did not choose to adjudicate, to deny its acceptance of the Court's compulsory jurisdiction without fear of self-contradiction, so Nicaragua might have relied on authorities finding that it has an inherent right of termination, again without any statement by Nicaragua in the record to contradict such a position.

[1] Even so, there is an analogy between the argument of the United States in this case and the reasons which induced this Court in the case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, to find an inherent right to attach reservations to certain multilateral treaties. This decision, which confirmed the evolution of treaty law with respect to reservations, spurred the development of the rules now set forth in the Vienna Convention, in Articles 19 *et seq.* While, as discussed *supra*, at paras. 344 *et seq.*, the consensual context for the operation of treaty reservations clearly distinguishes treaty law from practice under the Optional Clause, the reasons given in the decision (see *ibid.*, pp. 22 and 24) and in the works of key publicists explaining this evolution mirror many of the considerations which appear to have motivated the Court's confirmation of State practice with respect to declarations under the Optional Clause; see, e.g., O'Connell, *op. cit.*, at pp. 232 and 236; and Elias, *op. cit.*, pp. 27-35.

not begin to do so here. Quite apart from its impact on States which have previously invoked an inherent right to modify, it would not seem possible to articulate a decision rejecting such a right in terms that did not call for reconsideration of the analysis of the *Right of Passage* case. The flexibility inherent in the Optional Clause system is not distorted in any way by confirmation of an inherent right of modification; rather, this should enhance prospects of promoting new declarations, maintaining current acceptances, and avoiding encouragement of excessive express reservations.

400. The bounds of a practice with respect to reservations that is already premised, not on the Statute, but on an inherent right of declarants, should not be drawn on an artificial basis or a literalism that the system does not require. To "emprison" declarants, to borrow a phrase from the League's former Legal Adviser[1], by strict and literal application of the express terms of declarations, when these have evolved in such an unregulated and spontaneous fashion, would place those declarants with older documents, drafted prior to the fundamental changes in practices of termination and modification that have occurred, in an unequal and prejudicial position in relation to other, later declarants[2]. Such a lack of equality, mutuality and reciprocity cannot be sustained under the Statute.

401. While the issue previously has not been expressly decided by the Court, the rationale for upholding an inherent right of modification has already been

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[1] See comments of Emile Giraud in 1957 *Annuaire de l'Institut de droit international*, Vol. I, at pp. 281-282:

> "Si un Etat est libre de s'engager ou de ne pas s'engager, il doit logiquement pouvoir se dégager. Autrement les conventions seraient des conventions prisons et ce caractère serait fait pour enlever aux Etats le désir d'y devenir parties. En fait, il ne peut y avoir raisonnablement d'engagement éternel, et l'engagement fait sans indication concernant la durée et la dénonciation est en réalité le plus précaire de tous..."

Edvard Hambro, like Giraud, was a member of the Institute Commission which examined the compulsory jurisdiction of the Court. In this connection, he wrote that —

> "En principe il vaudrait la peine de lutter contre les réserves les plus extravagantes. Mais je doute s'il serait sage de déclarer que des réserves de grande portée sont illégales. Cela pourrait décourager une acceptation plus large. Je regrette ces réserves, mais je ne suis pas sûr que la Cour serait plus forte sans déclarations même assorties de réserves." (*Ibid.*, at p. 298.)

The *rapport définitif* stated that the question of modifications (and modifications effected by termination and subsequent filing of a new declaration) had been closely examined, and while the expanding practice of reservations was regretted, the Commission notably did not deem it useful to deal with recommendations on the matter in its resolution (*ibid.*, at pp. 206-207).

[2] Nicaragua argues that certain legislative history regarding the inclusion of the proviso for six months' notice of termination in the 1946 declaration should also apply to the right of modification invoked in this case (Memorial, paras. 125 and 126). This argument overlooks the fact that the feature of modification — as opposed to termination — as now entrenched in practice under the Optional Clause was exceptional at the time the United States declaration was made. The United States Senate did not consider, at that time, the question of modification at all, but rather only the possibility of a total rupture of the acceptance by the United States of the Optional Clause. The Nicaraguan argument would have this Court overlook the fundamental changes in subsequent State practice regarding modification and termination of declarations to alter the terms of acceptances and to preclude adjudication. It would have the Court presume bad faith in the reliance by the United States on Article 33 of the Charter regarding its preference and that of Nicaragua's neighbours (and indeed of the Security Council, by virtue of its endorsement of the Contadora process), to use alternative means of pacific dispute settlement in this case, means to which Nicaragua is itself a party. What the legislative history of the 1946

furnished by the decisions of the Court, State practice, and recognition by the commentators of the necessary adaptability of the Optional Clause system. The Court should thus confirm that the inclusion in a declaration of an express right of modification along the lines of that sanctioned in the *Right of Passage* case is *ex abundante cautela*, and not in itself the determinant of the existence or scope of the inherent right of modification consistent with the Statute.

Section IV. Even if Construed as a Termination of the 1946 Declaration, the 6 April Modification of the United States Declaration Effectively Suspended, before Seisin, Nicaragua's Claims from the Scope of the United States Consent to Jurisdiction

402. The United States explained in Section II, *supra*, that its 6 April note effected a modification, not a termination, of its 1946 declaration. Neverthe-

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declaration suggests is both that the case now before the Court would not then have been deemed admissible, and that, in any event, nothing in the acceptance was deemed to preclude use of appropriate alternative mechanisms. In including the proviso of the declaration excluding "disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future", the Senate virtually incorporated Article 95 of the Charter. See Senate Report No. 1835, "International Court of Justice", *op. cit.*, at p. 5 ("The same provision is found in the Charter of the United Nations, Article 95"); and Wilcox, "The United States Accepts Compulsory Jurisdiction", 40 *American Journal of International Law*, p. 699, at p. 709 (1946). This proviso, however, was given a very broad interpretation by Senator Morse, the drafter of the Senate resolution to confer advice and consent to the deposit of the declaration:

> "In other words, if we should accept, tomorrow, the compulsory jurisdiction of the World Court, it would not revoke or repeal or endanger in any degree whatsoever any existing agreement that we have with any other nation as to the settlement of disputes between us and that nation by arbitration *or by any other peaceful procedure, such as mediation or conciliation* . . ." ((Italics added); *Compulsory Jurisdiction, International Court of Justice*, Hearings Before a Subcommittee of the Committee on Foreign Relations, *op. cit.*, p. 36.)

John Foster Dulles submitted a memorandum to the Committee in which he noted in connection with the proviso that "it may be that disputes between members of the Pan American Union [now the OAS] could preferably be subjected to hemispheric procedures" (*ibid.*, p. 45). Charles Cheyney Hyde's written submission stated:

> "It may be thought wise that acceptance of the optional clause should not serve to prejudice the right of the parties to have timely recourse to other methods for the peaceful settlement of international disputes . . . Inasmuch as article 36 of the statute must be interpreted in harmony with the Charter, it is suggested that provisions for acceptance of the optional clause are not to be deemed to forbid the exercise of the right of the parties to have timely recourse to other methods of the peaceful settlement of international disputes, and that, accordingly, terms of acceptance in behalf of the United States need not go into the matter." (*Ibid.*, p. 121.)

This legislative history suggests that while the ramifications of acceptance of compulsory jurisdiction were not closely examined in terms of the requirements of practical dispute management consistent with Article 33 of the Charter, the proviso regarding other solutions was intended by key commentators to have a broader scope than the precise terms employed. The availability of recourse to non-adjudicatory dispute settlement means, including "hemispheric procedures", was not only understood by these commentators not to be precluded, but was viewed as implicit in the inter-relationship of the terms of the Charter and the annexed Statute of the Court. Thus, the position of the United States in this case that other means of resolving the current difficulties in Central America are preferable to adjudication is quite consistent with the flexibility which the Senate appears to have assumed in approving the declaration deposited in 1946.

less, Nicaragua has attempted to characterize the note in the alternative as a termination of the 1946 declaration and the substitution of a new declaration therefor. Nicaragua has founded on that premise many of its contentions that the note was invalid (Memorial, paras. 137 *et seq.*).

403. Nicaragua's intention in thus characterizing the 6 April note is plain. A proviso of the United States 26 August 1946 declaration provides as follows:

> "[T]his declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration." (*I.C.J. Yearbook 1982-1983*, p. 89.)

By characterizing the 6 April note as a "termination", Nicaragua hopes to make the six-month notice proviso applicable to the note and thereby render it effective only on 6 October 1984, that is, after the Application was filed.

404. The short answer to Nicaragua's arguments is that the 6 April note on its face was not a "termination", and the six-month notice proviso was, accordingly, inapplicable.

405. Even assuming, *arguendo*, that (1) the six-month notice proviso is applicable to the 6 April note and (2) that the note was not valid *erga omnes*, the note is nevertheless effective vis-à-vis Nicaragua. As the United States will show, Nicaragua's own declaration, if it ever entered into force, is terminable with immediate effect[1]. Nicaragua's argument necessarily implies that the United States was unilaterally bound by its own declaration not to effect a termination or modification except upon six-months' notice, while Nicaragua was free during those same six months to terminate or modify its declaration at will. Such a situation is intrinsically inequitable and contrary to the Statute's tenets of reciprocal and equal treatment.

A. Nicaragua's Declaration, Were it Effective, Would Be Immediately Terminable

1. Nicaragua's declaration is indefinite in duration, not unlimited

406. Nicaragua's 1929 declaration purports to "recognize as compulsory *unconditionally* the jurisdiction of the Permanent Court of International Justice" (*I.C.J. Yearbook 1982-1983*, p. 79 (italics added)). The term "unconditionally" (French, "purement et simplement") must be construed as a direct reference to the wording in Article 36 of the Permanent Court's Statute (now Art. 36 (3)) permitting a State to accept the jurisdiction "unconditionally or on condition of reciprocity on the part of several or certain States . . .". To accept jurisdiction "unconditionally" meant only to accept it with immediate effect, that is, not "on condition of reciprocity on the part of several or certain States". The phrase has no other recognized meaning[2].

407. Nicaragua's declaration, therefore, is simply silent on duration. It is "indefinite" in duration, not unlimited.

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[1] This subsection assumes, solely for the purpose of argument, that Nicaragua's declaration is in force. Nothing the United States argues in the following discussion should be read as indicating a contrary position to its argument in Part I that Nicaragua's declaration is ineffective and that Nicaragua has never accepted the compulsory jurisdiction of this Court.

[2] The meaning of "unconditional" acceptances has been examined exhaustively in the literature, and the publicists are virtually unanimous in the above construction. (See Briggs, *op. cit.*, pp. 240-242; Waldock, *op. cit.*, p. 255; Shihata, *op. cit.*, pp. 149-150; Hudson, *op. cit.*, p. 465; J. F. Williams, "The Optional Clause", 11 *British Year Book of International Law*, pp. 63-84 (1930); and Anand, *op. cit.*, pp. 159-160.)

2. *Older declarations of indefinite duration, like that of Nicaragua, are immediately terminable*

408. As the United States has shown, declarations under the Optional Clause are not treaties. Because of their unilateral nature, they are inherently more readily subject to unilateral termination or modification than a negotiated bilateral treaty binding both parties *ab initio*.

409. Paraguay's denunciation of its declaration in 1938, the limited objections at the time, and the lack of any objection when Paraguay was dropped from the 1959-1960 *Yearbook*, discussed *supra* at paragraphs 369 and 373, constitute the clearest demonstration that older declarations like that of Nicaragua are inherently terminable and thus modifiable with immediate effect[1]. The tenor of Nicaragua's argument with respect to unilateral termination of treaties (Memorial, para. 143) is both inconsistent with Article 56 of the Vienna Convention and the rationale behind it (see Elias, *op. cit.*, pp. 105-107), and, more importantly, inapposite to the Optional Clause system and its now uncontested practice of immediate denunciation and modification. Since, from the nature of the obligation as analysed in the *Nottebohm* and *Right of Passage* cases, variability and terminability of declarations are accepted until the date the Court is seized with a case, the conclusion would seem ineluctable that these older declarations, if terminable or modifiable at all, must be so at will, equally with the majority of declarations that presently expressly reserves such rights.

410. An inherent right of termination of such older declarations is confirmed by Shihata (*op. cit.*, p. 167), Rosenne (*Law and Practice of the Court*, Vol. I, pp. 417 and 472), Giraud (*loc. cit.* and 1959 *Annuaire de l'Institut de droit international*, Vol. II, p. 126), and Charpentier (*op. cit.*, p. 344). In the *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Jurisdiction of the Court, Judgment* (*I.C.J. Reports 1973*, p. 3), the Court was at pains to state that its decision with respect to the compromissory clause in that case did not imply any position on the opinion of authorities that —

> "declarations of acceptance of the compulsory jurisdiction of the Court . . . may be subject to unilateral denunciation in the absence of express provisions regarding their duration or termination" (*ibid.*, at pp. 15-16).

These judgments are doubtless influenced by the age of the instruments in question, the subsequent practice of the Court, and the "unreality[2]" of assuming a perpetual and unalterable obligation of such a character[3]. As argued above, it is difficult to ascribe a mutually binding obligation to the relationship between, on the one hand, a State that has accepted the Optional Clause in recent years with full knowledge of the manner in which this Court and States have construed it, and, on the other, a State like Nicaragua that, even by Nicaragua's own hypothesis, has not examined, applied or clarified the terms of its "unconditional" declaration in 55 years.

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[1] Nicaragua cites as "highly significant" the protests of several States at the time to Paraguay's action (Memorial, para. 142). Surely what is compelling, rather, is that no one has protested since. As Shihata notes (*op. cit.*, p. 167), "it may be significant that [Paraguay's] declaration has never since been invoked" following the dropping of Paraguay from the *Yearbook*.

[2] Rosenne, *The Time Factor*, *op. cit.*, p. 27; and Shihata, *op. cit.*, p. 167.

[3] Treaties regarding dispute settlement were one example which the International Law Commission considered in drafting the text of what eventually became Article 56 (1) *(b)* of the Vienna Convention dealing with treaties regarding which a right of denunciation or withdrawal may be implied by the nature of the treaty. Notably, in this regard, Sir Humphrey Waldock, as Special Rapporteur of the Commission, stated that this rule was intended to encompass "treaties of arbitration, conciliation, or judicial settlement" (*Second Report on the Law of Treaties*, U.N. doc. A/CN.4/156, Add. 1-3, *Yearbook of the International Law Commission*, Vol. II, p. 36, at p. 68 (1963)). After examining State practice under the Optional Clause — and without characterizing declarations as "treaties" — Sir Humphrey concluded:

B. Nicaragua never Accepted "the Same Obligation" as the United States Six-Month Notice Proviso and May not, therefore, Oppose that Proviso as against the United States

411. Nicaragua has never accepted and cannot be deemed to be bound by a requirement of six-months' notice, and thus has no legal right to invoke the six-month notice proviso and oppose it against the United States in the instant case.

412. Article 36 (2) of the Statute of the Court binds a declarant State only "in relation to any other State accepting the same obligation". The United States declaration itself reiterates that the United States only intended to bind itself with respect to other States "accepting the same obligation"[1].

413. The proviso in the 1946 declaration stating that the United States would terminate the declaration only upon six months' notice was an "obligation", indeed, an obligation of substantial practical significance co-equal in form and status to the other expressed conditions or provisos in that declaration[2]. The six-month notice proviso is certainly consistent with the object and purpose of Article 36 (2) of the Statute. A number of other States have accepted the same or a similar obligation[3]. In so far as the six-month notice proviso is binding in any respect, and even assuming that it was not modifiable by the note of 6 April, it is, by the terms of Article 36 (2) and the declaration itself, binding only vis-à-vis those States that had accepted "the same obligation" as the United States.

414. The nature of reservations under the Optional Clause requires this result.

> "Taken as a whole, State practice under the optional clause, and especially the modern trend towards Declarations terminable upon notice, seem only to reinforce the clear conclusion to be drawn from treaties of arbitration, conciliation and judicial settlement, that these treaties are regarded as essentially of a terminable character. Regrettable though this conclusion may be, it seems that this type of treaty ought, in principle, to be included in [the paragraph pertaining to treaties terminable by nature]." *(Ibid.)*

After thoroughly examining the issue both theoretically and in light of State practice, Sir Humphrey thus reversed the conclusion he had reached in his 1955 article, on which Nicaragua so heavily relies (Nicaraguan Memorial, paras. 110, 129, 132 and, in particular, 137 and 142).

[1] See Wilcox, *op. cit.*, at 709:

> "It follows that when the United States deposited its declaration with the Secretary-General we became bound only with respect to those other States which have deposited or which may deposit in the future similar declarations."

Wilcox was Head International Relations Analyst of the Library of Congress at the time.

[2] Note the structure of the final paragraphs of the 1946 declaration, which set forth three conditions ("*Provided*, that this declaration shall not apply to . . ."), which are listed in subparagraphs lettered *(a)-(c)*, and then immediately recite the duration and termination elements in identical conditional terms ("*Provided further* . . .").

[3] See the declarations of Denmark (*I.C.J. Yearbook 1982-1983*, at p. 62); Finland, at pp. 65-66; Luxembourg, at p. 73; Mexico, at pp. 76-77; the Netherlands, at p. 77; New Zealand, at p. 78; Norway, at p. 80; and Sweden, at p. 85; two declarations, those of Switzerland, at pp. 85-86, and Liechtenstein, at pp. 72-73, are terminable on one year's notice.

As noted above, when States file a declaration, they do not accept or object to reservations in existing declarations; indeed, there appears to have been but a single instance of an objection to a reservation in a subsequently filed declaration (see para. 374, second note, *supra*). The mutual effect of such reservations is determined only after a case is instituted. The normal effect of reservations between two declarant States before the Court is to narrow their mutual obligations to those that are congruent; that is to say, reservations of each State are given effect despite the typical lack of any prior acceptance or objection to the reservations by the other State.

415. Nicaragua may terminate or modify its declaration on notice. Nicaragua is therefore under no obligation equivalent to that of the United States such that it could be argued that parallel, congruent declarations created a mutual, or the "same" obligation. By undertaking *no* obligation in this regard, Nicaragua has failed to bring the United States notice provision into effect bilaterally and may not now invoke that provision to invalidate the 6 April note.

C. The Principles of Reciprocity, Mutuality and Equality of States before the Court Permit the United States to Exercise the Right of Termination with the Immediate Effect Implicit in the Nicaraguan Right of Termination, Regardless of the Six-Month Notice Proviso in the United States Declaration

416. Nicaragua's failure to accept the "same obligation" with respect to termination as did the United States may also be viewed from the perspective of the rights of the United States. It is axiomatic that each declarant State under the Optional Clause is entitled, in accordance with the principle of reciprocity, to invoke the rights, conditions and limitations enjoyed by another declarant State against that latter State. Here, since Nicaragua's declaration must be deemed to reserve implicitly the right of immediate termination, the United States is entitled to exercise such a right vis-à-vis Nicaragua, regardless of the right of the United States in this regard *erga omnes*.

417. The reasons for this were well stated by Sir Humphrey Waldock:

> "Reciprocity would seem to demand that in any given pair of States each should have the same right as the other to terminate the juridical bond existing between them under the Optional Clause . . . The inequality in the positions of the two States under the Optional Clause, if the principle of reciprocity is not applied to time-limits, becomes absolutely inadmissible when State A's declaration is without time-limit while that of State B is immediately terminable on notice to the Secretary-General. It would be intolerable that State B should always be able, merely by giving notice, to terminate at any moment its liability to compulsory jurisdiction vis-à-vis State A, whilst the latter remained perpetually bound to submit to the Court's jurisdiction at the suit of State B. The Court has not yet had occasion to examine this aspect of the operation of reciprocity in relation to time-limits. *In the light, however, of its interpretation of the condition of reciprocity in regard to reservations, the Court, it is believed, must hold that under the Optional Clause each State, with respect to any other State, has the same right to terminate its acceptance of compulsory jurisdiction as is possessed by that other State*." (*Op. cit.*, pp. 278-279 (italics added).)

Sir Humphrey continued his analysis by reference to a hypothetical case directly analogous to the present circumstances:

> "The point can, perhaps, be illustrated by considering the declarations of

> Norway, Sweden and the United Kingdom in the year 1950, when the United Kingdom filed its Application in the *Anglo-Norwegian Fisheries* case. At that date, the United Kingdom's declaration was terminable on notice to the Secretary-General, while those of both Norway and Sweden had fixed time-limits expiring in 1956. Assuming the application of reciprocity to time-limits, Norway would then have been entitled to give notice to the Secretary-General of the termination of her declaration with respect to the United Kingdom in virtue of the right of termination contained in the latter's declaration. If she had done so before the filing of the United Kingdom's Application in the case, she would have defeated the Application. *On the other hand, the termination of her declaration vis-à-vis the United Kingdom would have left her declaration in full force vis-à-vis Sweden.* A question might be raised as to whether Norway's termination of her declaration would operate only with respect to the United Kingdom or also with respect to all other States which had reserved a right to termination upon notice to the Secretary-General. It seems clear, however, that if Norway had purported to terminate her obligation under the Optional Clause only with reference to the United Kingdom and on the basis of a right derived reciprocally from the United Kingdom's declaration, Norway's declaration would remain in full force with respect to other States. The relations established between States under the Optional Clause, as has been emphasized, are of a bilateral rather than multilateral character. A notification to the Secretary-General intended to alter State A's obligations with respect only to State B has no effect therefore on State A's obligations under the Optional Clause with respect to other States. To allow a State, on the ground of reciprocity in regard to time-limits, the right to terminate its obligations under the Optional Clause with reference only to a particular State or States may add to the complexity of the Optional Clause system. To refuse it such a right would, however, be to establish a gross inequality between States in regard to the termination of their obligations under the Optional Clause." (*Ibid.* (italics in original).)

It is the hypothetical case stated in the sentence preceding that which Sir Humphrey chose to italicize, and not the totally inapposite example proferred by Nicaragua at paragraph 149 of its Memorial, that covers precisely the case at hand.

418. While the Court has dealt in prior cases with both temporal and substantive limitations, the issue of fundamental fairness raised by Sir Humphrey, and presented by this case, is one of first impression before the Court. Nicaragua, in its Memorial (paras. 145-148), principally relies on this Court's decision in the *Right of Passage* case to attempt to distinguish the application of the principle of reciprocity to time-limits on duration and termination. This emphasis is misplaced. There is no basis in the prior decisions of the Court applying the principle of reciprocity to temporal and substantive conditions for concluding that the principle applies any the less to such a time-limit which, as has been discussed *supra*, was a material condition of the United States declaration co-equal to other qualifications.

419. In the *Right of Passage* case, India argued that it should have been entitled to exercise vis-à-vis Portugal that State's reserved right to modify its declaration on notice to exclude particular categories of disputes[1]. The Court

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[1] See, in particular, the argument of the Attorney-General of India, *I.C.J. Pleadings, op. cit.*, Vol. IV, pp. 209-210.

ruled that since, as of the date of the seisin of the Court, India had not exercised such a right, it was not entitled to do so subsequently. This was no more than an affirmation of the rule in *Nottebohm* that the seisin of the Court may not be affected by subsequent acts. The Court simply did not address whether a modification by India *before* the date of filing of the Application would have been effective because of the reciprocal effect of Portugal's reservation[1,2].

420. Sir Humphrey's logic applies directly to the situation now before the Court. It would be a "gross inequality between States" to bind the United States to a six-month notice provision when Nicaragua was not similarly bound[3]. Fundamental principles of reciprocity, mutuality and equality of States before the Court require that the United States note of 6 April be recognized as immediately effective vis-à-vis Nicaragua.

Section V. The United States 6 April 1984 Note Is Effective under International Law and Is Valid under United States Law

421. Nicaragua asserts that the United States 6 April 1984 note is invalid under United States law and ineffective in international law (Memorial, paras. 150-162). These assertions are both irrelevant and unsupportable.

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[1] The position of India in *The Right of Passage* case is distinguishable in two important respects. The attempted reliance on the Portuguese condition was not true reciprocity; the Portuguese condition merely reserved the right to add further substantive or temporal qualifications, which would have required on Portugal's part the second step of notifying the Secretary-General of such a new reservation. There was the potential of a concrete future action to narrow acceptance; the third condition was not itself a substantive or temporal proviso to which reciprocity could meaningfully attach. More importantly, India had not taken any step, prior to the seisin of the Court, in the nature of a modification relevant to the case (nor had Portugal). In this case, the United States has made a timely, substantive qualification; the issue is what effective date to apply to it, in light of the principles of reciprocity and equality under the Statute. The facts of this case, as distinguished from those presented by the *Right of Passage* case, come squarely within Sir Humphrey's example involving Norway cited in para. 417, *supra*. Nicaragua's argument in para. 148 of its Memorial is oblivious to these factual distinctions, and seems to contend that the United States might have a reciprocal right of immediate termination solely in the event that *Nicaragua* had so terminated her own declaration (assuming, *arguendo*, it to be effective) before filing the Application. The lack of merit of this argument is patent; were a State to terminate an effective declaration immediately *before* filing its Application, the Court would surely lack compulsory jurisdiction over that State, and the Application would simply be dismissed. Nicaragua's example does not advance analysis of the holding of the Court in the *Right of Passage* case, and does not address what elements of the Statute or the practice of this Court require the result that reliance by the respondent State on the principle of reciprocity with respect to the time element of the applicant's termination right be precluded, where, as here, there was a timely exercise of the respondent's right before the Application was filed, and the time element was a material condition of the respondent State's acceptance.

[2] Maus, *op. cit.*, p. 101, n. 18, appears not to appreciate the important distinctions between the issue pressed by Sir Humphrey and the facts of the *Right of Passage* case; however, he concludes that the question posed by Sir Humphrey nonetheless remains unresolved by that case (*ibid.*, p. 102).

[3] *Also see* Maus, *op. cit.*, at p. 101:

> "Nous avons vu plus haut que certains Etats avaient accepté la juridiction de la Cour internationale pour un délai indéterminé. On peut se demander si, vis-à-vis des Etats ayant fait une telle déclaration, les autres Etats peuvent se prévaloir du principe de la réciprocité pour abroger leur acceptation seulement à leur égard.
>
> Il paraît difficile d'admettre une telle interprétation du droit de réciprocité, mais cette interprétation rétablirait un certain équilibre entre les différents Etats ayant accepté la juridiction obligatoire."

A. The 6 April Note Is Effective under International Law regardless of Its Status under Domestic United States Law Because a Foreign Minister Has the Apparent Authority to Bind the State Represented

422. Nicaragua's contentions as to the status of the 6 April note under United States law are, in the first instance, simply irrelevant to these proceedings. Professor Brownlie has rightly observed that under international law:

> "[I]n treaty-making and in the making of unilateral declarations a Foreign Minister is presumed to have authority to bind the State he represents." (*Principles of Public International Law*, p. 639 (3rd ed., 1979).)

423. This principle has been recognized by the Court, which on several occasions has articulated a broad theory of apparent authority (see *Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 71 and *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 269). As Judge Anzilotti noted in the *Eastern Greenland* case, in an opinion in which he dissented with the Court's opinion but not on this point:

> ". . . the constant and general practice of States has been to invest the Minister for Foreign Affairs — the direct agent of the chief of the State — with authority to make statements on current affairs to foreign diplomatic representatives, and in particular to inform them as to the attitude which the government, in whose name he speaks, will adopt in a given question" (*ibid.*, p. 91).

424. Articles 7 (2) and 67 (2) of the *Vienna Convention on the Law of Treaties* are consistent with State practice and with the principles enunciated by the Court. Under these Articles, a Minister for Foreign Affairs is not required to produce full powers with respect to the conclusion or termination of treaties.

425. If apparent authority suffices for a treaty, *a fortiori* it suffices for declarations. Indeed, many of the declarations, modifications and other notices deposited with the United Nations Secretary-General pursuant to Article 36 (4) of the Court's Statute are routinely executed by Foreign Ministers[1]. Their authority to do so has never before been challenged.

426. In the United States, the Secretary of State is the representative of the President in international affairs (22 U.S.C. §2656). The 6 April 1984 note from Secretary of State Shultz to the Secretary-General was an authorized and hence valid and effective exercise of the President's powers under Article II of the United States Constitution by the Secretary of State[2]. There is, therefore, no

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[1] States, the current declarations of which were signed by the Minister for Foreign Affairs or equivalent, include Barbados, Belgium, Costa Rica, Egypt, El Salvador, Gambia, Honduras, India, Kenya, Liberia, Malawi, Mauritius, Mexico, Nigeria, the Philippines, Somalia and Swaziland.

[2] Professor Briggs, in 1960 during Senate hearings on the United States declaration, noted that under international law, if the Secretary-General received notice from the President that the United States was terminating its declaration, that notice would be effective and international law would not "go behind and ask whether the Senate had approved or not" (in Whiteman, *Digest of International Law*, Vol. 12, p. 1317 (1971), citing *Compulsory Jurisdiction, International Court of Justice, Hearings before the Committee on Foreign Relations, United States Senate, 86th Congress, 2d sess., on S. Res. 94, a Resolution to Amend S. Res. 196, 79th Cong., 2d sess., Relating to the Recognition of the Jurisdiction of the International Court of Justice in Certain Legal Disputes*, 27 Jan. and 17 Feb. 1960, at p. 53).

reason to look behind the 6 April note and no credible basis to question its effectiveness under international law[1].

B. The 6 April Note Was Valid under United States Law

1. The United States declaration is not a "treaty" for purposes of United States constitutional processes

427. Contrary to Nicaragua's allegations, the 1946 declaration was not regarded as a treaty at the time that it was being considered. Francis O. Wilcox, Head International Relations Analyst of the Library of Congress, noted shortly after the Senate approved the declaration:

> "Clearly such a declaration, deposited by the head of a state, cannot be considered a treaty in the strict sense of that term. It is rather, as the Permanent Court pointed out in the *Phosphates* case, a unilateral act." (*Op. cit.*, at p. 705.)

428. In 1946, when the form that the United States declaration should take was being considered, it was recognized that Congressional participation was required[2], but that it could take any of several forms and still be effective[3].

2. The President may narrow or terminate United States obligations under its declaration accepting compulsory jurisdiction

429. It is recognized that the President could act alone to terminate the United States declaration. In 1960, Secretary of State Herter made this point clear during Senate hearings:

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[1] Nicaragua's invocation of Article 46 of the Vienna Convention on the Law of Treaties (Memorial, para. 158) is misplaced. It stands that Article on its head; the United States is confirming the validity of the 6 April action, not challenging it. (In any event, declarations are not treaties. Paras. 338 *et seq.*, *supra*.) Nicaragua has no basis under that Article to assert a lack of authority on the part of the Secretary of State.

[2] Under long-standing United States practice, the Executive may act alone to commit the United States to be bound by the result of processes of international arbitration or adjudication where the latter will not result in an international pecuniary, territorial, or other obligation on the part of the United States, requiring, under the United States Constitution, Congressional action (see Memorandum of Green H. Hackworth, then Legal Adviser to the Department of State, in Whiteman, *op. cit.*, Vol. 12, pp. 1267-1269). Thus, for example, the Executive has broad powers to settle, arbitrate or adjudicate claims against a foreign government (*Dames and Moore* v. *Regan*, 453 U.S. 654 (1981)). Since acceptance of the Court's compulsory jurisdiction would expose the United States to a range of potential liabilities, there was no question in 1946 that Congressional approval in some form was necessary.

[3]
> "While no one could doubt the authority of the United States Government to make such a declaration, a legitimate question arose as to the proper method to be followed under the constitution in order to legally bind our Government to the terms of Article 36. This uncertainty was reflected in the variety of procedures set forth in the three resolutions [considered]." (Wilcox, *op. cit.*, at pp. 705-706.)

(See also Under Secretary of State, Dean Acheson, *Compulsory Jurisdiction, International Court of Justice, Hearings Before a Subcommittee of the Committee on Foreign Relations, United States Senate, op. cit.*, p. 134; Lester H. Woolsey, Vice President of the American Society of International Law, *ibid.*, at p. 107; and Hackworth memorandum, in Whiteman, *op. cit.*, at p. 1267.) Nicaragua's quotation of Mr. Hackworth (Memorial, para. 153), in itself underscores that the 1946 declaration might have secured Congressional approval by means other than seeking the advice and consent of the Senate.

> "In the view of the Department of State, termination of the U.S. acceptance of the Court's compulsory jurisdiction would be effected by the filing, at the direction of the President, of a notice with the Secretary-General of the United Nations stating that the United States withdrew and terminated its acceptance of the Court's compulsory jurisdiction under article 36, paragraph 2, of the statute of the Court. This action by the executive branch might be taken following a Senate resolution, or a resolution of both Houses of the Congress. On the other hand, *the President could decide to file a notice of termination in his own discretion.*" (Whiteman, *op. cit.*, Vol. 12, p. 12, p. 1318 (italics added)[1].)

430. For the same reasons that the President may act alone to submit certain claims to arbitration or adjudication, the President may also act alone to terminate a United States declaration, or to suspend or modify it provided the effect is not to extend, but rather to limit potential United States exposure to international liabilities. Nicaragua, ignoring this settled practice with respect to the scope of Executive and legislative powers, attempts to demonstrate that Senate advice and consent must be obtained for any and all modifications to the 1946 declaration (Memorial, paras. 151-156).

431. The examples cited by Nicaragua to show that Senate approval is necessary are inapposite. In addition to pointing to the Senate's involvement in the 1946 declaration (Memorial, paras. 151-153), Nicaragua cites Senate consideration of whether to submit to the jurisdiction of the Permanent Court of International Justice (Memorial, para. 154), and consideration of whether to delete from the 1946 declaration the self-judging clause dealing with domestic jurisdiction (the "Connally amendment", Memorial, paras. 154-155). Submitting to the Permanent Court's jurisdiction or deleting the "Connally amendment", however, like submitting to this Court's compulsory jurisdiction, would have expanded rather than contracted potential United States obligations.

432. Treaty law analogies do not support Nicaragua's position. The President has the authority to act alone to terminate a treaty[2]. Nicaragua refers for support to Senate debates regarding the termination of the mutual security treaty with Taiwan (Memorial, para. 156). In that case, the President terminated the treaty without the approval of the Senate. Nicaragua fails to note that this action was upheld by the United States courts against a challenge by certain members of the Senate in the *Goldwater* v. *Carter* case[3]. The United States Court of Appeals for the District of Columbia Circuit noted the scope of the President's treaty powers and his authority to exercise them independently of the legislative branch:

> ". . . [T]he determination of the conduct of the United States in regard to treaties is an instance of what has broadly been called the 'foreign affairs power' of the President . . . [T]he President is 'the sole organ of the federal government in the field of international relations'. That status is not confined to the service of the President as a channel of communication . . . but embraces an active policy determination as to the conduct of the United States in regard to a treaty in response to numerous problems and circum-

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[1] Nicaragua, at para. 155 of its Memorial, admits that terminating the 1946 declaration is a step that "could perhaps be taken by the President acting alone".

[2] American Law Institute, Restatement of the Law, Second, *Foreign Relations Law of the United States*, Sec. 163, pp. 493-495; and memorandum of Legal Adviser Herbert Hansell, in *Digest of United States Practice in International Law*, 1978, pp. 735 ff.

[3] 617 F. 2d 697 (D.C. Cir. 1979), *vacated and remanded to the District Court with directions to dismiss the complaint*, 444 U.S. 996 (1979).

stances as they arise." (*Goldwater* v. *Carter*, 617 F. 2d 697, at 706-707 (footnotes omitted).)

The President also has the power to suspend the operation of a treaty[1].

433. Since the President may act alone to terminate or suspend the operation of a treaty obligation of the United States[2], *a fortiori* he may act to suspend partially, through the modification effected on 6 April, a formal commitment, like the 1946 declaration, that is not a treaty. Nicaragua's contentions to the contrary, in addition to being irrelevant, constitute a significant distortion of applicable United States legal authorities.

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[1] American Law Institute, Restatement of the Law, Second, *Foreign Relations Law of the United States, loc. cit.*; Opinion of Acting Attorney General Biddle with respect to the International Load Lines Convention, 40 *Opinions of Attorneys General*, No. 24 (1941); Hackworth, *Digest of International Law*, Vol. V, pp. 338-339 (1943); and *Digest of United States Practice in International Law*, 1979, pp. 746-747, quoting Alexander Hamilton, *Letters of Pacificus and Helvidius on the Proclamation of Neutrality of 1793*, p. 13.

[2] *Goldwater* v. *Carter*, 617 F. 2d 697.

PART IV. THE INADMISSIBILITY OF THE APPLICATION

INTRODUCTION

434. Whether or not Nicaragua and the United States have accepted, for the purposes of this case, the compulsory jurisdiction of the Court, the Application is nevertheless inadmissible[1].

435. The United States will demonstrate that the Application is inadmissible because, in the first instance, Nicaragua has failed to bring before the Court parties whose presence and participation is necessary for the rights of those parties to be protected and for the adjudication of the issues raised by the Application. The Application is inadmissible in the second place because Nicaragua is, in effect, requesting that the Court in this case determine the existence of a threat to the peace, a breach of the peace or an act of aggression, a matter which is committed to the competence of other organs, in particular the Security Council of the United Nations, by virtue of the history and express language of the Charter of the United Nations, and subsequent practice thereunder. In the third place, the Court should hold the Application to be inadmissible in view of the subject-matter of the Application and the position of the Court within the United Nations system, including the impact of proceedings before the Court on the on-going exercise of the "inherent right of individual or collective self-defence" under Article 51 of the Charter. In the fourth place, the Court should hold the Application to be inadmissible in consideration of the inability of the judicial function to deal with situations involving on-going armed conflict. Lastly, the Application should be held inadmissible because Nicaragua has failed to exhaust the established processes for the resolution of the conflicts occurring in Central America.

436. The United States submits that each of the grounds elaborated in this part is sufficient to establish the inadmissibility of the Nicaraguan Application, whether considered as a legal bar to adjudication or as a matter requiring the exercise of prudential discretion in the interest of the integrity of the judicial function.

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[1] In asserting the inadmissibility of the Application, it is not the intention of the United States to confine itself to, or to urge upon the Court, a particular characterization of the concept of "inadmissibility", recognizing that the issues present mixed questions of jurisdiction (competence) and admissibility. The United States notes in this regard that the Court has itself not sought to draw precise distinctions in this area at the expense of its examination of the substance of the questions before it (*Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 111, at p. 121; *Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 15, at p. 28; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253, jt. diss. op. of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock, at p. 363).

CHAPTER I

THE NICARAGUAN APPLICATION IS INADMISSIBLE BECAUSE NICARAGUA HAS FAILED TO BRING INDISPENSABLE PARTIES BEFORE THE COURT

Section I. Adjudication of Nicaragua's Claims Would Necessarily Implicate the Rights and Obligations of Other States

437. Nicaragua seeks to invoke the jurisdiction of this Court for a determination of what it claims to be the international responsibility of the United States for a variety of alleged unlawful activities in and against Nicaragua (Application, para. 14). Both the Application and its annexed "Chronological Account", however, on their face implicate third States, in particular Honduras, in the alleged unlawful activities (see Part III, Chap. II, *supra*[1]). They do so, in large part, by alleging that such third States have permitted their territory to be used as a staging and launching ground for alleged unlawful uses of force against Nicaragua[2]. It is well settled that a State that permits its territory to be used for the commission of internationally wrongful acts against another State itself commits an internationally wrongful act for which it bears international responsibility[3]. The adjudication of the alleged international responsibility of the United States prayed for by Nicaragua in its Application would necessarily involve the determination of the attendant international responsibility of those third States.

438. Moreover, the adjudication of Nicaragua's claims would necessarily involve the adjudication of the rights of those third States with respect to measures taken to protect themselves against unlawful uses of force. In this regard, the Nicaraguan Application requests, *inter alia*, a determination that the United States must "cease and desist immediately" —

> "from all support of any kind — including the provision of training, arms, ammunition, finances, supplies, assistance, direction or any other form of support — to any nation . . . engaged or planning to engage in military or paramilitary actions in or against Nicaragua" (para. 26 *(g)*).

The relief sought by Nicaragua in this respect would require the Court to proceed without regard to the inherent rights of individual and collective self-defence guaranteed to any such other State by Article 51 of the Charter, including the right of States to provide reasonable and proportionate assistance to friendly States in order to respond to externally-supported and directed subversion. To the extent that the relief sought by Nicaragua would prevent the United States from acceding to requests from any such other State for assistance in resisting armed intervention being conducted by Nicaragua against such other State or States, the Article 51 rights of those States must necessarily be impaired.

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[1] The considerations relevant to the indispensable party argument here are similar to those relevant to the discussion of the multilateral treaties reservation in Part III, Chapter II, *supra*, although, as explained in that Chapter, the applicable standards differ.

[2] See, for example, Application, para. 1, and Chronological Account, paras. 1, 2, 5, 7 and 9.

[3] *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 4, at p. 22; I. Brownlie, *System of the Law of Nations: State Responsibility (Part I)*, pp. 180-182 (1983); cf. C. De Visscher, *Théories et réalités en droit international public*, pp. 328-329 (4th ed., 1970).

439. Even assuming, *arguendo*, that the Court had the competence to adjudicate with respect to claims of self-defense under Article 51 of the Charter, a full and complete resolution of the matter presented to the Court in the Nicaraguan Application cannot, therefore, be achieved without the participation of those third States in the proceedings before the Court. Nicaragua cannot claim that such States are "engaged or planning to engage" in the use of force in or against Nicaragua, and at the same time deny that either the rights (in particular the inherent right of individual and collective self-defense, including the right to protect against unlawful armed intervention) or the obligations (including in particular the duty to refrain from the unlawful use of armed force) of such States are necessarily implicated by Nicaragua's allegations and prayers for relief. A determination by this Court that the United States must refrain from engaging in collective self-defense efforts in co-operation with those other States cannot, it is submitted, be distinguished from a determination that those other States are not entitled under the Charter to the exercise of those rights in the circumstances of the present case. The actions of those States are either lawful under the Charter, or they are not. If they are lawful, then the United States cannot by a judgment of this Court be enjoined from co-operating in those actions under Article 51 of the Charter.

440. The Court cannot reach a determination with respect to Nicaragua's claimed relief in this regard without determining the rights and obligations of those other States. Nicaragua, having itself alleged the complicity of third States in the alleged unlawful actions of the United States, cannot now claim that the fact of that complicity remains to be established, and that it can be established in their absence.

Section II. The Court cannot Adjudicate the Rights and Obligations of Third States without their Consent or Participation

441. It is fundamental to the jurisprudence of the Court that the Court cannot determine the rights and obligations of States without their express consent or participation in the proceedings before the Court. This rule derives from the principle of the sovereign equality and independence of States, and lies at the root of this Court's jurisdiction in any contentious proceedings[1]. It is also closely related to the considerations that led the United States to the adoption of the multilateral treaty reservation to its declaration of 26 August 1946 accepting the jurisdiction of this Court under Article 36 (2) of the Statute of the Court, discussed *supra*.

442. This rule was first formally articulated by this Court's predecessor in the *Eastern Carelia* case[2], and has been restated by the Court on numerous occasions[3], including, in particular in *Monetary Gold Removed from Rome in 1943, op. cit.* The Nicaraguan Memorial of 30 June attempts to avoid this fundamental rule

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[1] *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3, sep. op. Vice-President Nagendra Singh, at p. 48.

[2] *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, at p. 27.

[3] See, e.g., *Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, 1928, P.C.I.J., Series A, No. 15*, at p. 22; *Corfu Channel, Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948*, p. 15; *Anglo-Iranian Oil Co., Judgment, I.C.J. Reports 1952*, p. 93, at pp. 102-103; *Ambatielos, Merits, Judgment, I.C.J. Reports 1953*, p. 10, at p. 19.

by drawing an artificial and specious distinction between the adjudication of "responsibilities" and other adjudications (Memorial, paras. 238, 243 *et seq.*). The interests of third States not before the Court would be as seriously damaged by the adjudication of the rights of a party before the Court that resulted in the prohibition of the exercise by that party of an otherwise existing right affecting such third States (for example, the right to engage in collective self-defense under Article 51 of the Charter) as by the adjudication of a derivative responsibility, as in the *Monetary Gold* case. In the instant case, a determination by the Court that the furnishing by the United States of assistance to third States was unlawful would necessarily affect the right of those third States to engage in individual or collective self-defense against armed intervention conducted or controlled by Nicaragua. The rights of those third States cannot be determined by the Court without their consent or participation in the present proceedings[1].

443. The participation of those third States is also required for the full development of the facts necessarily predicate to any judicial determination of the rights and duties of the two Parties now before the Court. The Court cannot adjudicate the lawfulness of United States assistance to third States in the region without passing judgment as to whether those States are engaged, or are planning to engage, in the lawful exercise of their inherent right of individual and collective self-defense against Nicaraguan and Nicaraguan-sponsored attacks. That in turn necessarily requires the determination of the facts relating to Nicaraguan activities in and against those third States. Facts concerning the activities of third States and Nicaragua's actions regarding those States may not be in the possession or control of a party before the Court and cannot legitimately and fully be determined in the absence of such States (*Eastern Carelia, op. cit.*, at p. 28). The Court cannot make determinations of such fundamental significance to the security of States on the basis of a partial record.

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[1] The Nicaraguan reliance (Memorial, para. 247), on the Court's recent decision denying Italy's application for intervention in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1984*, p. 3, is misplaced, since a decision on the merits of the matter between Libya and Malta may not affect any potential third-party claim to a portion of the continental shelf on either side of the Libya-Malta line. In the present case, in contrast, a decision that United States assistance to third States was unlawful would inevitably and irrevocably affect the rights under Art. 51 of the Charter of the third States receiving such assistance.

CHAPTER II

THE APPLICATION WOULD REQUIRE THE ADJUDICATION BY THE COURT OF A SUBJECT-MATTER SPECIFICALLY COMMITTED TO OTHER MODES OF RESOLUTION BY THE CHARTER OF THE UNITED NATIONS

Section I. The Nicaraguan Allegations Constitute a Request for a Determination by the Court that there Exists a Threat to the Peace, a Breach of the Peace or an Act of Aggression

444. Nicaragua seeks to claim a breach by the United States of a wide variety of allegedly separate and distinct international legal obligations (Application, para. 26). Each of Nicaragua's numerous allegations, however, constitutes no more than a reformulation and restatement of a single fundamental claim by which all others must stand or fall, namely that the United States is engaged in an unlawful use of armed force amounting to a threat to the peace, a breach of the peace or acts of aggression against Nicaragua.

445. This essential claim is evident, in the first instance, from the entire tenor of the factual and legal allegations set forth in the Application. The "Statement of Facts" at the very beginning of the Application commences with a sweeping, conclusory allegation that the United States —

> ". . . is using military force against Nicaragua and intervening in Nicaragua's internal affairs, in violation of Nicaragua's sovereignty, territorial integrity and political independence and of the most fundamental and universally accepted principles of international law" (para. 1).

Although put forth as an allegation of "fact", the quoted passage is in actuality a statement of legal conclusions. The significance of these conclusions, it must be assumed, was well known to Nicaragua inasmuch as it is clearly an adaptation of Article 1 of the Definition of Aggression adopted by the General Assembly of the United Nations on 14 December 1974. That Article provides as follows:

> "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition[1]."

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[1] G.A. res. 3314 (XXIX), Annex. The correlation between the Application and the Definition of Aggression does not end there. For example, Art. 3 of the Definition of Aggression includes among the acts that "qualify as an act of aggression" (unless the Security Council determines otherwise) the following:

> "*(f)* The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; [and]
>
> *(g)* The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."

Cf. Application, *inter alia*, paras. 1, 3, 10 and 11.

Indeed, the cited Definition is expressly relied upon by Nicaragua as a basis for Nicaragua's alleged claims against the United States (Application, para. 25).

446. Similar legally significant characterizations of alleged facts pervade the Application. The United States is alleged to be engaged in "illegal activities" (*ibid.*, para. 1), that are claimed to be "mounting in intensity and destructiveness" (*ibid.*, para. 3). Nicaragua alleges "repeated attacks across its own borders" (*ibid.*, para. 5). Nicaragua also asserts that the United States is engaged in the use of "armed force against Nicaragua" in the form, *inter alia*, of "large-scale assaults intended to capture portions of Nicaraguan territory" (*ibid.*, para. 10). All these allegations of "fact" conclude with the concession that makes crystal clear Nicaragua's fundamental claim:

> "In the recent past[1], Nicaragua has called the attention of the Security Council and the General Assembly of the United Nations to these activities of the United States, *in their character as threats or breaches of the peace, and acts of aggression*." (*Ibid.*, para. 12 (italics added).)

447. Nicaragua seeks both to mask what it is in fact asking the Court to determine, and to avoid the consequences of such a claim for the admissibility of the Application, by purporting to bring before the Court the "strictly juridical aspects of the matter" *(ibid.)*. But that itself cannot confer jurisdiction over the subject-matter on this Court. Whether or not the determination of a "threat to the peace, breach of the peace or act of aggression" in this case involves a conclusion of a "juridical" nature, it is one that is committed to a different organ. As the United States will demonstrate, the artificiality of the distinction sought to be maintained by the Application in this respect can only be understood in terms of an attempt to avoid the necessary consequences of Article 39 of the Charter[2] on the competence of the Court to entertain the Application and the claims set forth therein[3].

448. Nicaragua's essential claim that the alleged actions of the United States constitute a "threat to the peace, breach of the peace or act of aggression" (Application, para. 12), is carried forward into the Nicaraguan Memorial (paras. 1, 3, 179, 193, 195, 197, 210, *et al*). Again Nicaragua, perhaps mindful of the implications for the competence of the Court that allegations couched in the precise language of Article 39 of the Charter would carry, has employed different terms. These terms nevertheless must be regarded as legally synonymous with that language, as has been recognized in the Definition of Aggression, *supra*. The

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[1] By "recent past" the Application is presumably referring to Nicaragua's unsuccessful attempt on 4 April 1984 — five days before the filing of its Application with the Registrar of the Court — to have the Security Council make the determination that Nicaragua is asking the Court to make.

[2] Article 39 provides as follows:

> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

[3] Nicaragua further seeks to avoid the procedural consequences under the Charter of a claim that an act or series of acts constitutes a "threat to the peace, breach of peace, or act of aggression" (Charter, Art. 39), by reformulating the identical claims in terms of what the Application asserts to be "general and customary international law" (Application, paras. 20 through 26). The United States has explained in Part III, Chapter II, *supra*, that Nicaragua's claims in this regard constitute no more than a paraphrase of its Charter claims, and that the General Assembly resolutions on which it relies are merely elucidations of the Charter.

nature of the Nicaraguan claims is also evident from the oral presentation of counsel for Nicaragua on 25 April, which in large part entailed a restatement of the Application's allegations in terms of, *inter alia*, "use of force" (**I**, p. 38), "use and threat of force" (*ibid.*, p. 43), "armed attacks" (*ibid.*, pp. 46, 50), and similar consequential terms under the Charter.

449. Nicaragua is in fact requesting of the Court a determination that the alleged actions of the United States constitute "a threat to the peace, a breach of the peace or act of aggression" within the meaning of Chapter VII of the Charter of the United Nations. Nicaragua's efforts to characterize the fundamentals of that claim as evidencing the existence of a solely "legal" dispute cannot overcome its real nature, one that, as will be shown, is confided to the competence of the political organs. Nicaragua cannot allege the existence of a threat to the peace, breach of the peace, or act of aggression without accepting the treatment specifically prescribed by the Charter for the determination of such matters.

Section II. The Matters Alleged in the Nicaraguan Application and Memorial Are Committed by the Charter of the United Nations to the Exclusive Competence of the Political Organs

A. The Text of the Charter

450. Under the Charter of the United Nations, all allegations of on-going threats to the peace, breaches of the peace and acts of aggression are confided to the political organs for consideration and determination. This is evident from the face of the Charter, its history and consistent practice thereunder.

451. The specific language of the Charter makes clear that decisions concerning the resort to armed force during on-going armed conflict, that is, situations that may constitute threats to the peace, breaches of the peace, acts of aggression, or exercises of the inherent right of individual or collective self-defense, are reserved to the exclusive competence of the political organs. Article 1 (1) of the Charter numbers among the "Purposes of the United Nations" the following:

> "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

Article 24 (1) of the Charter confers upon the Security Council "primary responsibility for the maintenance of international peace and security", and Article 24 (2) enjoins the Security Council to carry out that responsibility "in accordance with the Purposes and Principles of the United Nations", including necessarily those set forth in Article 1 (1).

452. The "primary responsibility" of the Security Council for the maintenance of international peace and security under Article 24 (1) of the Charter is given two distinct facets by the Charter, one that relates to the pacific settlement of international disputes, and one that relates to the determination of a threat to the peace, a breach of the peace, or an act of aggression. The former is governed principally by Chapter VI (Arts. 33 through 38), the latter by Chapter VII (Arts. 39 through 51, of which Arts. 39 and 51 are of fundamental importance).

453. Pacific settlement of disputes is directed toward "any dispute" or "any situation which might . . . give rise to a dispute" the continuation of which is "*likely* to endanger the maintenance of international peace and security" (Charter, Arts. 33, 34 (italics added)). In such circumstances the parties are to seek to resolve their differences by pacific means of their own choosing, including — "by negotiation, enquiry, mediation, conciliation, arbitration, *judicial settlement*, resort to regional agencies or arrangements, or other peaceful means . . ." and the Security Council may call upon the parties to proceed in such fashion (italics added). Moreover, the Security Council is empowered to make specific recommendations to the parties:

> "1. The Security Council may, *at any stage of a dispute of the nature referred to in Article 33 or a situation of like nature*, recommend appropriate procedures or methods of adjustment.
>
> . . . .
>
> 3. *In making recommendations under this Article* the Security Council should also take into consideration that *legal disputes should as a general rule be referred by the parties to the International Court of Justice* in accordance with the provisions of the Statute of the Court." (Charter, Art. 36 (italics added).)

The Charter thus recognizes the appropriateness of judicial settlement to the resolution of disputes and situations which are considered "likely" to endanger the maintenance of international peace and security if permitted to continue, that is, circumstances which have not yet given rise to an actual threat to the peace, breach of the peace or act of aggression[1].

454. The second facet of the role of the Security Council in the scheme of the Charter concerns the question of actual threats to the peace, breaches of the peace, and acts of aggression. Article 39 of the Charter provides in deliberately plain language that —

> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

Nowhere in Articles 39 through 51, the Charter provisions dealing specifically with situations of the sort alleged in the Application and Nicaraguan Memorial, is there a reference to judicial settlement as a means of resolving on-going armed conflict. Unlike disputes or situations the continuation of which may give rise to active hostilities and with respect to which the possibility of adjudication by the Court is preserved in Articles 33 and 36 of the Charter, *loc. cit.*, the provisions of the Charter dealing with the on-going use of armed force contain no recognition of the possibility of settlement by judicial, as opposed to political, means.

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[1] In this respect, Articles 33 through 38, and in particular Article 36, conform precisely to the pattern established by Article 1 (1) of the Charter, under which "adjustment or settlement of international disputes or situations which might lead to a breach of the peace" must be brought about "in conformity with the principles of justice and international law" whereas no such limitation extends to "the prevention and removal of threats to the peace, and . . . the suppression of acts of aggression or other breaches of the peace". As will be subsequently shown, this distinction, far from being accidental, was the product of a considered and deliberate choice on the part of the drafters of the Charter.

455. The textual commitment of such matters to resolution by the political organs is carried forward in Article 51 of the Charter, which provides in pertinent part as follows:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

The precise language of Article 51 leaves no room for a judicial determination to terminate a resort to armed force in the midst of on-going armed conflict, which necessarily involves the exercise of the inherent right of self-defense by one or more of the parties to the conflict. The evaluation of claims concerning the exercise of the "inherent right" of individual or collective self-defense is the necessary concomitant of the evaluation of claims that a particular resort to armed force constitutes a "threat to the peace, breach of the peace or act of aggression". The determination of the latter *ipso facto* determines the former, and is committed by Article 39 of the Charter to the competence of the Security Council. Article 51, in its last sentence, expressly reserves this "authority and responsibility of the Security Council under the present Charter". Moreover, as "the principal judicial organ of the United Nations" the Statute of which "forms an integral part of the present Charter", Charter, Article 92, the Court is bound by the categorical prescription of Article 51 that "[n]othing in the present Charter shall impair" the inherent right of individual or collective self-defense.

456. Article 24 (1) of the Charter vests in the Security Council the "primary" responsibility for the maintenance of international peace and security. In this particular respect Article 24 (1) takes into account *(a)* the functions accorded by the Charter to the General Assembly in connection with questions concerning the maintenance of international peace and security, and *(b)* the role of "regional arrangements or agencies" in the same connection that is recognized and preserved by Article 52 of the Charter.

457. The relevant functions of the General Assembly in this regard include the general power to discuss and make recommendations respecting "any questions or matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter" (Charter, Art. 10); the power to consider and make recommendations concerning "the general principles of co-operation in the maintenance of international peace and security" (*ibid.*, Art. 11); the power to discuss "any questions relating to the maintenance of international peace and security" that may be brought before it by a member State (under Art. 35 of the Charter) or by the Security Council and to make recommendations thereon *(ibid.)*; the power to call the attention of the Security Council to "situations which are likely to endanger international peace and security" *(ibid.)*; and the power to recommend measures "for the peaceful adjustment of any situation . . . including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations" (*ibid.*, Art. 14). These responsibilities of the General Assembly are, on the other hand, expressly qualified, and the primacy of the Security Council preserved, by Article 12, which precludes the General Assembly from making any recommendations concerning "any dispute or situation" with respect to which the Security Council "is exercising . . . the

functions assigned to it in the present Charter[1]". In addition, under Article 11 (2) any "question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion".

458. Of similar significance is the textual commitment of responsibility for the maintenance of international peace and security to regional agencies or arrangements under Article 52 of the Charter, which provides in pertinent part as follows:

> "1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.
>
> 2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.
>
> 3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council."

The Contadora process is precisely the sort of regional arrangement or agency, established by the Member States directly involved and sanctioned by the Security Council and the Organization of American States as the accepted mechanism for addressing the conflict in Central America, that Article 52 contemplates (see Chap. V, Sec. I, *infra*). Its functioning would be gravely jeopardized by adjudication of the matters alleged in the Nicaraguan Application and Memorial.

459. By way of contrast to the weight of the textual evidence to the effect that the Charter commits to the political organs — the Security Council primarily, but also to the General Assembly and to regional arrangements or agencies — responsibilities relating to the maintenance of international peace and security, the Charter is virtually silent with respect to any relationship between judicial settlement and such issues. Articles 33 and 36 (3) of the Charter recognize the potential utility of recourse to judicial settlement in situations or disputes the continuation of which is likely to give rise to a threat to the maintenance of international peace and security (but not where, as alleged by Nicaragua, a threat to the peace, a breach of the peace or act of aggression is in actual progress). Only Article 36 (3) makes specific reference to the possible referral of such incipient threats to the Court, and does so in a manner that clearly presupposes a prior determination by the Security Council that the matter in question constitutes a "legal dispute" *and* that a recommendation that the parties

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[1] In its resolution 377 (V) of 3 November 1950, the General Assembly asserted the right, if the Security Council "fails to exercise its primary responsibility" under Article 24 in "any case where there appears to be a threat to the peace, breach of the peace, or act of aggression", to make "appropriate recommendations" to member States for "collective measures . . . to maintain or restore international peace and security". This resolution, in view of the express language of Article 39 of the Charter, has been the subject of much scholarly comment (see, e.g., I. Brownlie, *International Law and the Use of Force by States*, pp. 333-334 (1963) and the materials cited there). It is not necessary to engage in a comprehensive examination of the legal bases for that resolution to observe that, at the very least, the secondary responsibilities for the maintenance of international peace and security vested in the General Assembly by the Charter, in particular Article 11 thereof, are of direct relevance. No comparable textual basis exists for imputing analogous responsibilities to the Court.

bring the matter before the Court in accordance with its Statute would be both appropriate and effective in the circumstances of the case. (In any case before it, even one involving a threat to the peace, breach of the peace or act of aggression, the Security Council can, of course, avail itself of a request to the Court for an advisory opinion under Article 96 (1) of the Charter, whenever the Council believes that the Court's advice concerning the legal aspects of matters under consideration in the Council would assist the Council in dealing with the situation.)

B. The Origins and History of the Charter

460. The allocation to the political organs of responsibility for the resolution of on-going armed conflict that emerges from the text of the Charter is further confirmed by the background and history of the development of the Charter[1].

461. The Charter, and the Organization that it established, had their birth in the flames of war and the collapse of the League of Nations system. In the Moscow Declaration of October 1943, the Governments of the United States, the United Kingdom, the Soviet Union and China jointly declared that

> "they recognize the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving states, and open to membership by all such states, large and small, for the maintenance of international peace and security" (United States Department of State, *Toward the Peace Documents*, Publication 2298 (1945), at p. 6).

462. The United States had for some time been deeply engaged in studying possible mechanisms for an effective post-war international organization, in which "primary attention" was focused on the problem of providing for "security against aggression[2]". Rather than resurrect the League of Nations approach, wherein the political organs were vested with essentially concurrent power, the United States assumed the need for a "plenary, conference-type organ combined with a selective, council-type organ" and for making the smaller organ "an executive agent" in which "control of the security function" would be centred[3]. In these early efforts relatively little consideration was given to the problem of post-war judicial mechanisms, beyond the broad assumption of the need for an international court on the pattern of the Permanent Court of International Justice[4].

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[1] See generally, R. Russell, *A History of the United Nations Charter* (1958); S. Krylov, *Materialy k Istorii Organizatsii Obedinennykh Natsii: Sozdanie Teksta Ustava Organizatsii Obedinennykh Natsii* (Academy of Sciences of the USSR 1949); L. Kopelmanas, *L'Organisation des Nations Unies: les sources constitutionnelles de l'ONU*, pp. 10-110 (1947).

[2] Russell, *op. cit.*, at p. 227.

[3] Russell, *op. cit.*, at pp. 228-229.

[4] In an internal draft prepared in 1942-1943 it was proposed that Article 36 of the Statute of the Permanent Court be revised to permit the Council unilaterally to refer to the Court any dispute that was considered to be threatening the peace. As revised, Article 36 would have read in pertinent part as follows (italics added):

> "The jurisdiction of the Court shall comprise *all cases involving disputes* as to the respective rights of the parties which the parties refer to it or *which, in the event that a threat to the peace exists, may be referred to it by the Council* . . ." (Draft Statute, Art. 24, United States Department of State, *Postwar Foreign Policy Preparation, 1939-1945*, Publication 3580 (1950), App. 15, p. 485, at p. 488.)

Work on this draft was suspended in late 1943. It is significant that this particular proposal was not retained in the United States Tentative Proposals for a General International Organization of 18 July 1944, *infra*.

463. The work of the United States in developing plans for a post-war international organization resulted in the issuance, on 18 July 1944, of the United States Tentative Proposals for a General International Organization[1] (hereinafter "Tentative Proposals"). The proposed international organization would have four principal organs: a "general assembly", an "executive council", an "international court of justice", and a "general secretariat" (Tentative Proposals, part I, sec. D (1)). The proposed executive council would have

> "primary responsibility for the peaceful settlement of international disputes, for the prevention of threats to the peace and breaches of the peace, and for such other activities as may be necessary for the maintenance of international security and peace" (*ibid.*, part III, sec. B (1)).

Its specific powers would include the power "to determine the existence of any threat to the peace or breach of the peace, and to decide upon the action to be recommended or taken to maintain or restore peace", and to "seek the advice and assistance of the general assembly in any matter in this connection, and of the international court of justice in any matter within the competence of the court" (*ibid.*, part VI, sec. A (1)). The proposed general assembly, for its part, would be empowered to assist the executive council, at its request, in connection with the latter's responsibilities with respect to the settlement of disputes "likely to endanger security or to lead to a breach of the peace" and in connection with the "maintenance or restoration of peace" (*ibid.*, part II, sec. B (2) *(b)*).

464. The overwhelming emphasis of the Tentative Proposals is on the resolution of questions concerning peace and security by the political organs of the proposed organization; there is no comparably comprehensive treatment of the proposed international court. The Tentative Proposals provided only that the Permanent Court of International Justice should be "reconstituted in accordance with a revision of its present Statute", and that the revised Statute should form part of the "basic instrument" of the new organization (*ibid.*, chap. IV).

465. The Tentative Proposals were furnished to each of the other three Governments that joined in the Moscow Declaration *(supra)*. After a period of consideration and revision, they emerged in the form of the four-power Dumbarton Oaks Proposals for the Establishment of a General International Organization of 9 October 1944[2] (hereinafter "Dumbarton Oaks Proposals"). The Dumbarton Oaks Proposals carry forward the preoccupation with international peace and security and, in that respect, the exclusive emphasis on political mechanisms for dealing with situations of on-going armed conflict[3].

466. The Dumbarton Oaks Proposals envisaged an Organization comprised of four principal organs: a General Assembly, a Security Council, an international court of justice[4], and a Secretariat (Dumbarton Oaks Proposals, chap. IV,

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[1] United States Department of State, *Postwar Foreign Policy Preparation, 1939-1945, op. cit.*, App. 38, at pp. 595 ff.

[2] United States Department of State, *Dumbarton Oaks Documents on International Organization*, Publication 2257 (1945), at pp. 5-16.

[3] In assigning principal responsibility for the maintenance of international peace and security to a single organ of the new organization, the framers of the Dumbarton Oaks Proposals were mindful of the weakness of the League of Nations system in that regard: "Il a consisté non plus à imiter Genève, mais au contraire à modifier le système antérieur pour en éviter les faiblesses reconnues et pour les adapter aux nouvelles conditions mondiales." (Kopelmanas, *op. cit.*, at p. 20.)

[4] It may be noted that the Dumbarton Oaks Proposals deliberately left "international court of justice" uncapitalized. The four powers left undecided whether the court would be the then-existing Permanent Court, with a revised Statute, or a new entity with an entirely new statute (Russell, *op. cit.*, at p. 430; Krylov, *op. cit.*, at pp. 52-53, 58-59).

para. 1). The Security Council would have "primary responsibility for the maintenance of international peace and security" (*ibid.*, chap. VI, sec. B, para. 1). The General Assembly would have

> "the right to consider the general principles of co-operation in the maintenance of international peace and security; . . . to discuss any questions relating to the maintenance of international peace and security"

brought before it by a Member or by the Council, and to make recommendations thereon; the General Assembly would refer "any such questions on which action is necessary" to the Council, and would not "on its own initiative make recommendations on any matter relating to the maintenance of international peace and security" that was being dealt with by the Council (*ibid.*, chap. V, sec. B, para. 6).

467. All four powers were "in complete agreement that the functions of maintaining peace and security should be controlled by the Security Council", and to indicate this "integrated *[sic]* concept of security", combined virtually all the provisions relating to the security system in chapter VIII of the Dumbarton Oaks Proposals[1]. The Security Council would have the power

> "to investigate any dispute, or any situation which may lead to international friction or give rise to a dispute, in order to determine whether its continuance is likely to endanger the maintenance of international peace and security" (Dumbarton Oaks Proposals, chap. VIII, sec. A, para. 1)

and "[i]n general" would "determine the existence of any threat to the peace, breach of the peace or act of aggression" (*ibid.*, sec. B, para. 2).

468. The only references in chapter VIII of the Dumbarton Oaks Proposals to judicial mechanisms occur in section A, relating to "disputes the continuation of which is likely to endanger the maintenance of international peace and security". The parties to any such dispute should "obligate themselves" to seek a solution by "peaceful means", including "judicial settlement", and the Security Council may call upon them to do so (*ibid.*, chap. VIII, sec. A, para. 3). Moreover, "[j]usticiable disputes" should "normally be referred to the international court of justice", while the Security Council may "refer to the court, for advice, legal questions connected with other disputes" (*ibid.*, para. 6). There is no reference to the Court in section B, relating to threats to the peace, breaches of the peace or acts of aggression.

469. The significance of this background is that it is directly and intimately related to the allocation of functions in the Charter of the United Nations, as agreed upon at the San Francisco Conference that began on 25 April 1945. The Dumbarton Oaks Proposals were in fact "suggested" as the basis for the work of the Conference in the invitations that went out for it, and the resulting Charter bears a close resemblance to those proposals[2].

470. Once again, the participants in the San Francisco Conference had as their compelling motivation the desire to establish a general international organization the most important function of which would concern the maintenance of international peace and security. How the drafters of the Charter

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[1] Russell, *op. cit.*, at p. 440.

[2] Russell, *op. cit.*, at p. 542; Krylov, *op. cit.*, at pp. 35, 69. A parallel table of the Dumbarton Oaks Proposals and the provisions of the Charter is included as Appendix A to the *Report to the President on the Results of the San Francisco Conference*, United States Department of State Publication 2349 (26 June 1945), at pp. 176 ff. (hereinafter "*Report to the President*").

conceived of such functions, and of their allocation among the several organs of the new Organization, is clear.

471. First of all, the provisions of chapter VIII of the Dumbarton Oaks Proposals, relating to arrangements for the maintenance of international peace and security, underwent little substantive change. In so far as the Security Council is concerned, the two issues that occupied most attention were whether the exclusive responsibilities of the Council for determinations of threats to the peace, breaches of the peace or acts of aggression, implied in chapter VIII of the Dumbarton Oaks Proposals, should be shared to a greater or lesser extent by the General Assembly, and whether the Charter itself should incorporate, as guidance to the Council, a definition of "aggression".

472. The conclusions reached by the Conference on both questions, and reflected in the language of the Charter, are neatly summarized in the report of Committee 3 of Commission III (Security Council) of the Conference, which report states in pertinent part as follows:

> "An initial category of amendments proposed by the various powers referred to the procedure contemplated in Section B of Chapter VIII [of the Dumbarton Oaks Proposals] for the determination of the existence of threats to the peace or of acts of aggression, and of the role of the Security Council in this procedure.
>
> *A. Participation by the Assembly or Enlargement of the Council*
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> A general discussion was first entered into on the proposal to supplement the action of the Security Council *by participation of the Assembly* in decisions relative to enforcement measures or to provide for the *participation of states not members of the Council* in decisions relative to such matters.
>
> . . . .
>
> [The majority of the powers that expressed their opinion] stated that the application of enforcement measures, in order to be effective, must . . . above all be swift; they recognized in general that it is impossible to conceive of swift and effective action if the decision of the Council must be submitted to ratification by the Assembly, or if the measures applied by the Council are susceptible of revision by the Assembly. This, moreover, would be contrary to the basic idea of the Organization, which contemplated a differentiation between the functions of the Council and those of the Assembly.
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> Under these conditions, the Committee formally declared itself, by several votes, against intervention by the Assembly in this procedure." (Doc. 943/III/5, 11 *UNCIO*, p. 12, at pp. 14-15 (italics in original).)

473. With particular regard to the question of defining the term "aggression" and of allocating responsibility for determining the applicability of the concept in a particular case, the report recites in pertinent part:

> "A more protracted discussion developed in the Committee on the possible insertion in paragraph 2, section B, Chapter VIII [of the Dumbarton Oaks Proposals] of the *determination of acts of aggression*.
>
> Various amendments proposed on this subject, notably one by the Delegation of Bolivia[1], recalled the definitions written into a number of treaties

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[1] One may note the similarities between the definition of "aggression" proposed by Bolivia at the San Francisco Conference and the factual and legal allegations of Nicaragua in the present case:

> concluded before this war but did not claim to specify all cases of aggression. They proposed a list of eventualities in which intervention by the Council would be automatic. At the same time they would have left to the Council the power to determine the other cases in which it should likewise intervene. There was no question of defining aggression, but simply of enumerating the particularly flagrant cases.
>
> Although this proposition evoked considerable support, it nevertheless became clear to a majority of the Committee that a preliminary definition of aggression went beyond the possibilities of this Conference and the purposes of the Charter. The progress of the technique of modern warfare renders very difficult the definition of all cases of aggression. It may be noted that, the list of such cases being necessarily incomplete, the Council would have a tendency to consider of less importance the acts not mentioned therein; these omissions would encourage the aggressor to distort the definition or might delay action by the Council. Furthermore, in the other cases listed, automatic action by the Council might bring about a premature application of enforcement measures.
>
> *The Committee therefore decided* to adhere to the text drawn up at Dumbarton Oaks and *to leave to the Council the entire decision, and also the entire responsibility for that decision, as to what constitutes a threat to the peace, a breach of the peace, or an act of aggression*." (11 *UNCIO*, at p. 17 (italics added).)

The view of Committee 3 of Commission III was entirely consonant with the United States understanding of the matter:

> "The Conference finally agreed that even the most simple and obvious cases of aggression might fall outside any of the formulae suggested, and, conversely, that *a nation which according to a formula strictly interpreted could be deemed the offender in any particular instance might actually — when all circumstances were considered — be found to be the victim of intolerable provocation*. Since it was admittedly impossible to provide a complete list, the Security Council might have a tendency to consider of less importance acts of aggression not specifically covered therein." (*Report to the President*, at p. 91 (italics added).)

474. The cumulative effect of the foregoing is to establish the incontrovertible intention of the drafters of the Charter that situations involving the on-going use of armed force, such as that claimed to exist in the Nicaraguan Application of 9 April, are to be addressed by the political organs in order to facilitate a

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"A state shall be designated an aggressor if it has committed any of the following acts to the detriment of another state.

(*a*) Invasion of another state's territory by armed forces.
(*b*) Declaration of war.
(*c*) Attack by land, sea, or air forces, with or without declaration of war, on another state's territory, shipping, or aircraft.
(*d*) Support given to armed bands for the purpose of invasion.
(*e*) Intervention in another state's internal or foreign affairs.
(*f*) Refusal to submit the matter which has caused a dispute to the peaceful means provided for its settlement.
(*g*) Refusal to comply with a judicial decision lawfully pronounced by an International Court."

(*Proposals of the Delegation of the Republic of Bolivia for the Organization of a System of Peace and Security*, doc. 2/G/14*(r)*, 3 *UNCIO*, p. 577, at p. 585.)

quick and effective response, which prior determinations of legal fault would jeopardize.

475. That the use of force during on-going conflict could properly be dealt with only by political mechanisms is further underscored by the negotiating history of Article 1 (1) of the Charter. As included in the Dumbarton Oaks Proposals, that Article would have read as follows:

> "The purposes of the Organization should be:
>
> 1. To maintain international peace and security; and to that end to take effective collective measures for the prevention and removal of threats to the peace and the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means adjustment or settlement of international disputes which may lead to a breach of the peace." (Dumbarton Oaks Proposals, chap. I, para. 1.)

Various delegations, concerned lest the new Organization enjoy too much freedom of action in dealing with on-going conflict, suggested amendments to the general effect of expressly limiting the range of possible responses to those that conformed to justice and international law[1]. After considerable discussion, the Conference chose instead to include language to the desired effect only in the second part of Article 1 (1), relating to adjustment or settlement of international disputes or situations. It did so on the ground that the Organization's first priority was to take measures intended to bring a given conflict to a halt; imposition of a test based on "justice" or "international law" would tend to provide "a loophole for questioning any specific action, and a possibility for delaying measures and procedures while discussing abstract definitions[2]". Once the conflict had been dealt with, then the Organization "would have the latitude to apply the principles of justice and international law"; by way of contrast, situations which have not yet given way to armed conflict are those in which the "concept of justice and international law . . . can find a real scope to operate, a more precise expression and a more practical field of application[3]".

476. Preoccupation with the role of the political organs in dealing with on-going uses of armed force dominates the history of the San Francisco Conference. The virtual silence of the negotiating record, in so far as a role for the Court in that respect is concerned, is therefore doubly significant. A Turkish amendment to preclude the Security Council from intervening in a matter before the Court was understood to apply only with respect to a dispute which was "likely" to endanger international peace and security, and would not have constrained the Council from acting in cases where such a dispute had ripened into an actual "threat to the peace[4]". A Uruguayan proposal to broaden the subject-matter jurisdiction of the Court to reach "any difference, opposition or conflict among nations, whatever its character", made no headway at the Conference (*Summary Report of the Seventeenth Meeting of Committee IV/1*, doc.

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[1] See generally proposals by Bolivia, Cuba, Czechoslovakia, Ecuador, Egypt, France, Greece, Iran, Mexico, Panama, Turkey and Uruguay (*Documentation for Meetings of Committee I/1*, doc. 215/I/1/10, 6 *UNCIO*, p. 525, at pp. 535-552).

[2] *Report of Committee 1 (Preamble, Purposes, and Principles) of Commission I (General Provisions)*, doc. 944/I/1/34(1), 6 *UNCIO*, p. 446, at p. 453.

[3] *Ibid.* See also Krylov, *op. cit.*, at pp. 100, 103.

[4] *Summary Report of the 10th Meeting of Committee 2 (Peaceful Settlement) of Commission I (Security Council)*, doc. 530/III/2/20, 12 *UNCIO*, pp. 73-74. No action was taken on the Turkish proposal.

759/IV/1/59/Ann. B, 13 *UNCIO*, p. 246, at p. 253; *Declaration of the Delegation of Uruguay*, doc. WD 35/III/2/21, 12 *UNCIO*, pp. 82-84[1]).

477. The essentially political character of the Charter's approach to dispute settlement in situations of on-going armed conflict was, moreover, central to the United States understanding of the results of the San Francisco Conference[2]. As described by Leo Pasvolsky, Special Assistant to Secretary of State Stettinius for International Organization Affairs, during the hearings on the proposed Charter before the Committee on Foreign Relations of the United States Senate on 10 July 1945:

> "the question of the definition of danger to international peace and security or threat to international peace and security necessarily has to be left to the determination of the Security Council.
>
> . . . .
>
> [T]he Security Council has to determine that a particular dispute in fact is of such a nature that its continuance would be likely to endanger the maintenance of international peace and security. Now, international peace and security, I should say, is understood broadly here. A dispute may involve only two nations at the start, and if the Security Council thinks that the dispute will grow and involve other nations, it will want to act. The Security Council, however, has to be the judge as to whether the dispute is of such a nature that it should intervene and take action. It will also have to decide whether or not its intervention might make the situation worse[3]."

With particular regard to Article 39 of the proposed Charter, Dr. Pasvolsky observed that —

> "article 39 envisages a situation which has become so aggravated that it is no longer a question of whether or not it may result in a threat to the peace, but an actual threat to the peace exists.
>
> . . . .
>
> [The failure of the Charter to define 'aggression'] was done deliberately, because it was found impossible to find a comprehensive, all-inclusive definition, and it was felt that unless the definition of the word 'aggression' were left to the Security Council itself, we would simply be setting up stan-

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[1] In this connection it is worthy of note that during the course of the deliberations over what became Chapter VI of the Charter, Belgium proposed an amendment to permit a State party to a dispute before the Security Council to seek an advisory opinion from the Court as to whether "a recommendation or a decision made by the Council or proposed in it infringes on *[sic]* its essential rights" (*Agenda for the Eighth Meeting of Committee III/2*, doc. 432/III/2/14, 12 *UNCIO*, p. 55). An "essential right" was characterized as one "granted by positive international law as an essential right of statehood" (*Summary Report of the Seventh Meeting of Committee III/2*, doc. 433/III/2/15, *ibid.*, p. 47, at pp. 48-49). In the event of an affirmative opinion from the Court, the Security Council would have had either to reconsider the matter or to refer it to the General Assembly for decision. The Belgian proposal was heavily criticized, *inter alia*, because it would "result in the decision by the Court of International Justice of political questions in addition to legal questions" (*Summary Report of Ninth Meeting of Committee III/2*, doc. 498/III/2/19, *ibid.*, pp. 65-66; see also Krylov, *op. cit.*, at pp. 181-182; Russell, *op. cit.*, at pp. 664-665). The Belgian amendment was withdrawn.

[2] See generally, *Report to the President, op. cit.*

[3] *The Charter of the United Nations for the Maintenance of International Peace and Security: Hearings before the Senate Committee on Foreign Relations*, 79th Cong., 1st Sess., pp. 284-285 (1945).

> dards which would provide an easy escape for a would-be aggressor. The definition would be just a signal as to what should be avoided.
>
> *Senator Brooks.* That is a change, however, in the usual practice in drawing up an international agreement, is it not?
>
> *Mr. Pasvolsky.* Well, it is certainly customary in many cases to leave matters of that sort to the discretion of a body that will have to do the administering[1]."

478. The history of the Charter, the intentions of its sponsors and the records of the San Francisco Conference, and the contemporaneous understanding of the United States participants thus provide overwhelming evidence for the proposition that threats to the peace, breaches of the peace and acts of aggression were to be treated exclusively by the political mechanisms established by the Charter for the purpose. Conversely, that same history provides no support whatever for the notion, implicit in the Nicaraguan Application and rather more explicit in its Memorial, that this Court may intervene in that process by reaching its own determinations and judgments on the merits of any such question.

C. Subsequent Practice of States and United Nations Organs

479. The Charter of the United Nations and the Statute of this Court constitute together a comprehensive international agreement, and it is well established that the subsequent practice under an international agreement may be looked to as a guide to its interpretation[2]. With respect to the instant case, the consistent practice of the Member States of the United Nations, and of the constituent organs of the Organization itself, demonstrates the Charter's exclusive commitment of questions concerning the resort to force during on-going hostilities to political organs for resolution.

1. The Nicaraguan Application is without precedent

480. It would be impracticable to include within the confines of this Counter-Memorial a recitation of all the instances since 1945 in which an unlawful use of armed force was alleged to be in progress, and it is not necessary to do so. It is sufficient merely to observe that, to the extent that one or another of the disputants has sought to appeal the rightness of its cause to the international community, or to seek the intervention of that community with a view toward achieving a resolution of the conflict, that party has brought the matter to the attention of a political organ, whether it be the Security Council, the General Assembly, or a regional agency or arrangement. By the opposite token, one cannot identify, prior to the Nicaraguan Application of 9 April 1984, a single instance in which the lawfulness of an allegedly on-going use of armed force was submitted to the Court for determination.

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[1] *The Charter of the United Nations for the Maintenance of International Peace and Security: Hearings before the Senate Committee on Foreign Relations*, 79th Cong., 1st Sess., at p. 287.

[2] See, e.g., A. McNair, *The Law of Treaties*, pp. 424-429 (1961); *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128, at p. 135; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151; Vienna Convention on the Law of Treaties, Art. 31, 1155 *UNTS* 340.

2. *The* Corfu Channel *case*

481. Indeed, the only case in which the lawfulness of the use of armed force has been placed in central issue before this Court was in the *Corfu Channel* case *(op cit.)*. The manner in which that case came to be before the Court is instructive with respect to the relative role of political and judicial modes of settlement.

482. The *Corfu Channel* case arose from an incident in which two British warships were damaged by the explosion of mines, alleged to have been laid by Albania or for which Albania was otherwise alleged to be responsible, in the Corfu Channel on 22 October 1946. Efforts to arrive at a bilateral settlement having failed, the United Kingdom brought the matter before the Security Council on 10 January 1947. On 25 March, a draft resolution ascribing responsibility to Albania failed of adoption in the Security Council. The matter continued before the Security Council, and on 9 April 1947 the Council adopted resolution 22 (1947) recommending that the disputants "should immediately refer the dispute to the International Court of Justice in accordance with the provisions of the Statute of the Court".

483. The question of whether the Security Council was the appropriate forum for consideration of the Corfu Channel incident was in large measure responsible for the Council's recommendation that the matter be referred to the Court. On 24 February 1947 the representative of Poland observed, after a reprise of the various legal issues raised in connection with the incident:

> "[We] cannot decide upon all these legal problems in this Council. We cannot discuss here all these facts which, as in a detective story, first prove and then disprove various theories. Such deliberations are not required of this Council. Its task is to decide essential questions connected with the maintenance of international peace and security . . .
>
> This, of course, does not mean that the Security Council is helpless in the British-Albanian dispute, but it is not our task to solve puzzles. Article 34 of the Charter states clearly that 'The Security Council may investigate any dispute . . . in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.'
>
> There is no danger to peace in this dispute. The Corfu Channel has been cleared, and there remains only the question of indemnities and not one of world war or peace. *We do not believe that a threat to peace can result from that unfortunate incident, which took place many months ago.*
>
> . . . .
>
> There remains another way out, of course. We can use Article 36, paragraph 3, of the Charter and call upon the parties to direct their dispute to the International Court of Justice[1]." (Italics added.)

On 3 April the representative of the United Kingdom admitted that the case "may involve no probability of an immediate breach of the peace[2]", and the representative of Brazil elaborated the notions implicit in the Polish statement of 24 February:

> "The Security Council is not and cannot be a tribunal. It is *par excellence*

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[1] United Nations, *Security Council Official Records* (hereinafter "*SCOR*"), 2nd Yr., No. 18, 111th Mtg., 24 February 1947, pp. 375-376.

[2] *SCOR*, 2nd Yr., No. 32, 125th Mtg., 3 April 1947, p. 684.

the political and executive organ of the United Nations. Ours is not a judicial function, nor do we meet here as international judges.

. . . .

While vesting the Council with ample and even elastic functions, the Charter circumscribed them within the provision that they must be discharged in accordance with the principles and purposes of the United Nations. Whatever the nature of a dispute, it can become the object of the Council's consideration only if its continuance is likely to endanger the maintenance of international peace and security[1]."

484. The Corfu Channel debates as such indicate an understanding of the process involved that is antithetical to the construction of the Charter urged upon the Court by Nicaragua in its Application and Memorial and that gains all the more force from being nearly contemporaneous with the establishment of the Charter system for the maintenance of international peace and security. Decisions concerning the resort to force during on-going armed conflict are the exclusive preserve of political modes of resolution, which by their nature need not entail determinations of legal fault. Conversely, the Charter structure can accommodate, and in fact expressly contemplates, the possibility of judicial settlement of disputes that have not yet evolved into armed conflict, or that involve questions arising out of conflicts that had themselves come to an end, so long as the disputants consent to have the matter dealt with on that basis.

3. *Post-Charter efforts to define "aggression"*

485. Of substantial relevance to the present case are the lengthy efforts to achieve a definition of "aggression" that reached their culmination in the adoption by the General Assembly of the consensus definition set forth as part of resolution 3314 (XXIX) of 14 December 1974.

486. As earlier noted, the drafters of the Charter deliberately declined to include a definition of "aggression" in the Charter, for the principal reason that no such definition could encompass all possible circumstances, and because a technical and legalistic approach to the question could be exploited by a transgressor for its own purposes. Active consideration of the issue was resumed in 1950, when the General Assembly, responding to a Soviet initiative in the First (Political and Security) Committee, adopted resolution 378 (V) B of 17 November 1950, which referred the matter to the International Law Commission. The International Law Commission was unable to reach agreement on a definition of "aggression", and so reported to the General Assembly at its 6th Session[2]. The General Assembly at that session instructed the Secretary-General to submit a report on the subject to the General Assembly at its 7th Session[3].

487. It is not the United States present purpose to address itself to the multitude of legal and conceptual questions concerning the substantive aspects of the question of defining "aggression" that confronted the participants in these early discussions in the General Assembly and the International Law Commission; a useful summary may be found in the *Report of the Secretary-*

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[1] *SCOR*, 2nd Yr., No. 32, 125th Mtg., 3 April 1947, pp. 686-687.

[2] *Report of the International Law Commission Covering the Work of Its Third Session*, United Nations, *General Assembly Official Records* (hereinafter "*GAOR*"), 6th Sess., doc. A/1858, Chap. III, pp. 8 ff.

[3] Resolution 599 (VI) of 31 January 1952.

General to the General Assembly on the Question of Defining Aggression, submitted in response to resolution 599 (VI) (hereinafter "*Secretary-General's Report*")[1]. It is, rather, the United States intention to establish that these various issues were addressed in an institutional context that went virtually unquestioned, namely that the purpose and utility of any such definition of "aggression" would be as guidance to the political organs in the exercise of their respective responsibilities under the Charter; the record is nearly silent with regard to any references to judicial settlement of international disputes. In this regard the *Secretary-General's Report* observes —

> "98. In the first place, there was a discussion to determine which acts the organs and Members of the United Nations should regard as constituting aggression for the purpose of applying the collective security system.
>
> 99. Secondly, a study was made of the question of offences against peace, chief of which is the crime of aggression.
>
> 100. Though closely related, these two questions are distinct and were considered separately by the General Assembly and the International Law Commission.
>
> 101. *The question of defining aggression concerns the political organs of the United Nations*, since it is their duty to organize collective action to check aggression, and to do so they might have to determine the aggressor.
>
> 102. The question of the crime of aggression also concerns international penal law, since persons who commit acts deemed to constitute the crime of aggression must be punished. In normal circumstances, the crime of aggression will be tried some time after its commission . . ." (Italics added.)

The *Secretary-General's Report* discusses, *inter alia*, the "extent to which a definition of aggression would be binding on the organs responsible for determining or punishing an aggressor" (*ibid.*, paras. 487-520). It is in that connection, and that connection only, that the *Secretary-General's Report* makes any reference to this Court. Under the heading "legal value and authority of the definition with respect to an international tribunal", the Report states the following:

> "503. In the Sixth Committee the international court visualized as the organ responsible for applying the definition was a criminal court; but it is conceivable that the International Court of Justice or an *ad hoc* tribunal might have occasion to deal with a matter relating to a case of aggression.
>
> 504. Mr. Abdoh (Iran) said:
>
> '. . . that definition could serve as a guide to United Nations bodies and at the same time have mandatory force for a judicial body to be established in the future'."

The *Secretary-General's Report* offers no citation for the proposition referred to in the second part of paragraph 503, and the Sixth Committee appears not to have addressed the question. In any event, the question of concern is not whether the Court may not, under any circumstances, have occasion to determine the consequences of past "aggression" or unlawful uses of armed force generally; rather, the question concerns the competence of this Court, or any judicial organ, to evaluate competing claims concerning the use of force during an on-going armed conflict notwithstanding the Charter's allocation of such matters to the political organs.

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[1] *GAOR*, Anns. (VII) 54, pp. 17 ff. (doc. No. A/2211).

488. The General Assembly at its 7th Session appointed a special committee of 15 members and requested it to prepare and submit a "draft definition of aggression or a draft statement of the notion of aggression" to the General Assembly at its 9th Session[1]. In its report to the General Assembly in 1953, this special committee explored the issue at length but could not come to agreement on a definition[2]. Under the heading "The effect of a definition of aggression on the exercise of the jurisdiction of the organs of the United Nations", the report noted:

> "98. The members of the Committee were agreed that any definition of aggression included in a General Assembly resolution would merely have the status of a recommendation . . . However, some members of the Committee stressed that such a definition would exercise great moral authority over the international organs called upon to pronounce on a case of aggression."

In that respect the report made reference only to the Security Council[3].

489. The General Assembly at its 9th Session carried the question over to its 12th Session[4], which adopted resolution 1181 (XII) of 25 November 1957, establishing an *ad hoc* committee to determine when further General Assembly consideration of the matter would be appropriate. No significant additional action was taken until 1967, when the General Assembly established a 35-member Special Committee on the Question of Defining Aggression[5]. That Special Committee labored for seven years, and ultimately produced a consensus Definition of Aggression that was approved by the General Assembly at its 29th Session[6].

490. That the General Assembly in adopting the Definition of Aggression was acting in consideration solely of the question of international peace and security and the responsibility of the political organs is manifest from the face of the Declaration itself. Preambular paragraphs 2 and 4 provide as follows:

> "*The General Assembly,*
>
> . . . .
>
> *Recalling* that the Security Council, in accordance with Article 39 of the Charter of the United Nations, shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.
>
> . . . .
>
> *Bearing in mind* that nothing in this Definition shall be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations, . . ."

The institutional orientation of the preamble is carried forward in the operative articles, for example:

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[1] Resolution 688 (VII) of 20 December 1952.

[2] *Report of the Special Committee on the Question of Defining Aggression, 24 August-21 September 1953, GAOR, Supp.* 11 (IX) (doc. A/2638).

[3] *Ibid.*, para. 12.

[4] Resolution 895 (IX) of 4 December 1954.

[5] Resolution 2330 (XXII) of 18 December 1967.

[6] Resolution 3314 (XXIX) of 14 December 1974, *supra.*

> "*Article 2*
>
> The first use of armed force by a State in contravention of the Charter shall constitute *prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances*, including the fact that the acts concerned or their consequences are not of sufficient gravity.
>
> . . . .
>
> *Article 4*
>
> The acts enumerated above are not exhaustive and *the Security Council may determine that other acts constitute aggression* under the provisions of the Charter.
>
> . . . .
>
> *Article 6*
>
> Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful." (Italics added.)

To similar effect is the fourth operative paragraph of resolution 3314 (XXIX):

> "*[The General Assembly,]*
>
> 4. *Calls the attention* of the Security Council to the Definition of Aggression, as set out below, and recommends that it should, as appropriate, take account of that Definition as guidance in determining, in accordance with the Charter, the existence of an act of aggression."

491. These features of the Definition of Aggression and resolution 3314 (XXIX) were not the product of chance. From the very beginning of the Special Committee's work, there existed general agreement on the central role of the Security Council[1]. It was also considered that the General Assembly had the competence to provide guidance to the Security Council in this regard in view of the Assembly's general competencies under Articles 10, 11 and 13 of the Charter[2]. The records of the Special Committee and of the consideration of its work by the Sixth (Legal) Committee of the General Assembly contain no mention of the possibility of the performance of such functions by an international judicial tribunal, in particular this Court[3]. Indeed, one of the more difficult problems with which the drafters of the Definition had to contend was that of reconciling a formal definition of "aggression" with the discretion inherent in the Security Council under the Charter scheme. This problem was ultimately

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[1] See generally, *Report of the Special Committee on the Question of Defining Aggression, GAOR* (23rd Sess.), doc. No. A/7185/Rev. 1.

[2] *Ibid.*, para. 39.

[3] See generally, the Reports of the Special Committee on the Question of Defining Aggression, *GAOR* (23rd Sess.), doc. A/7185/rev.1, *GAOR* (24th Sess.), doc. A/7620, *GAOR* (25th Sess.), doc. A/8019, *GAOR* (26th Sess.), doc. A/8419, *GAOR* (27th Sess.), doc. A/8719, *GAOR* (28th Sess.), doc. A/9019, and *GAOR* (29th Sess.), doc. A/9619 and Corr.1, and the Reports of the Sixth (Legal) Committee, *GAOR* (23rd Sess.), doc. A/7402, *GAOR* (24th Sess.), doc. A/7853 *GAOR* (25th Sess.), doc. A/8171, *GAOR* (26th Sess.), doc. A/8525, *GAOR* (27th Sess.), doc. A/8929, *GAOR* (28th Sess.), doc. A/9411 and Corr.1, and *GAOR* (29th Sess.), doc. A/9890. See also the summary records of the consideration of the issue in the Sixth (Legal) Committee, *GAOR* (23rd Sess.), doc. A/C.6/SR. 1026-1099 (1028th and 1073rd through 1082nd meetings), *GAOR* (24th Sess.), doc. A/C.6/SR. 1100-1175 (1164th through 1170th meetings), *GAOR* (25th Sess.),

resolved in Articles 2 and 4 of the Definition, *supra*, which articles not only affirm the primary responsibility of the Security Council, but underscore the inherently political nature of the Charter scheme in so far as the determination of such questions is concerned. It is difficult to avoid the conclusion that the drafters did not address the role of judicial settlement for the simple reason that none considered it relevant to decisions on the resort to force during on-going armed conflict, in particular determinations of threats to the peace, breaches of the peace and acts of aggression.

492. In sum, the lengthy and complex history of the question of defining aggression confirms the existence of a virtually universal understanding of member States that matters involving on-going armed conflict are the exclusive province of the political organs — in particular the Security Council — under the structure established in the Charter.

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doc. A/C.6/SR. 1176-1244 (1202nd through 1209th and 1211th through 1213th meetings), *GAOR* (26th Sess.), doc. A/C.6/SR. 1245-1307 (1268th through 1276th, and 1281st meetings), *GAOR* (27th Sess.), doc. A/C.6/SR. 1308-1393 (1346th through 1352nd, 1366th, and 1371st meetings), *GAOR* (28th Sess.), doc. A/C.6/SR. 1394-1459 (2439th through 1445th meetings), and *GAOR* (29th Sess.), doc. A/C.6/SR. 1460-1521 (1471st through 1484th, 1486th through 1489th, and 1502nd through 1505th meetings).

CHAPTER III

THIS COURT MAY NOT PROPERLY EXERCISE SUBJECT-MATTER JURISDICTION OVER NICARAGUA'S CLAIMS

Section I. The Court Should Defer to the Other Organs of the United Nations with Respect to Matters Confided to those Other Organs by the Charter

A. General Considerations

493. One of the principal distinctions between this Court and its predecessor, the Permanent Court of International Justice, is that this Court is an organ of the United Nations. Article 92 of the Charter provides in this respect:

> "The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter."

The inclusion of the Court as a "principal organ" of the proposed new general international organization was agreed upon without much difficulty in connection with the development of the Dumbarton Oaks Proposals[1] and was readily accepted by the San Francisco Conference[2].

494. The Charter, in addition to being an international agreement, is an instrument of a constitutional character[3]. In order for any organizational scheme to function in the intended manner, each element of it must exercise particular caution to avoid infringing the designated spheres of action of the others. The position of the Court in the United Nations system offers no exception to this basic principle:

> "The meaning of the statement that the Court as an organ is an integral part of the United Nations as an Organization has to be elucidated from the general principles of the law of the United Nations regulating the relations *inter se* of the organs, and those of the organs individually with the whole, the Organization . . . [T]here is no reason to suppose that it would attribute to itself, as a principal organ, a general character any different from that which it would attribute to other principal organs . . .
>
> The will of the Organization is made manifest by the actions of those organs within whose sphere of competence a particular matter lies. This was made clear in the interpretation given by the Court to the phrase 'judgment

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[1] Russell, *op. cit.*, at pp. 429-430; Krylov, *op. cit.*, at pp. 52-53.

[2] "The judicial process will have a central place in the plans of the United Nations for the settlement of international disputes by peaceful means. An adequate tribunal will exist for the exercise of the judicial function, and it will rank as a principal organ of the Organization." (*Report of Committee IV/1 (International Court of Justice) to Commission IV (Judicial Organization)*, doc. 913/IV/1/74(1), 13 *UNCIO*, p. 381, at p. 393.)

[3] See generally, Kopelmanas, *op. cit.*; Vallat, "The General Assembly and the Security Council of the United Nations", 29 *British Year Book of International Law*, p. 63, at p. 66 (1952); *Report to the President*, *op. cit.*

of the Organization' appearing in Article 4 of the Charter[1]. 'The judgment of the Organization means the judgment of the two organs [the General Assembly and the Security Council] mentioned . . .' Furthermore, 'to ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution'. It then depends upon the terms of the Charter whether such expression of will is binding upon the other principal organs, or merely persuasive for them; but in general it cannot be doubted that the mutual relations of the principal organs ought to be based upon a general theory of co-operation between them in the pursuit of the aims of the Organization.

This approach opens the way to *a functional conception of the task of the Court in its capacity of a principal organ of the United Nations, according to which, subject to overriding considerations of law (including judicial propriety), the Court must co-operate in the attainment of the aims of the Organization and strive to give effect to the decisions of the other principal organs, and not achieve results which would render them nugatory.*" (S. Rosenne, *The Law and Practice of the International Court*, Vol. I, pp. 69-70 (italics added).)

495. The jurisprudence of the Court contains ample recognition of the proposition that the Court, in the exercise of its judicial functions under the Charter, must act with due regard for the functional responsibilities of its co-ordinate organs:

> "It is the act of the Applicant which seises the Court but even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity." (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 15, at p. 29.)

496. The *Northern Cameroons* case involved a claimed breach by the United Kingdom of its obligations under the Trusteeship Agreement for the Territory of Cameroons of 13 December 1946. On 21 April 1961 the General Assembly adopted a resolution terminating that Agreement, in so far as those aspects of principal interest to the applicant were concerned, effective 1 June 1961[2]. On 30 May 1961, the applicant instituted proceedings in the Court. Elaborating on the general principle of judicial propriety stated in the preceding paragraph, the Court found that it could not adjudicate upon the claims of the applicant (*Judgment, op. cit.*, at p. 38). In doing so, the Court made certain observations of direct relevance to the present case:

> "It was not to this Court but to the General Assembly of the United Nations that the Republic of Cameroon [i.e., the applicant] directed the argument and the plea for a declaration that the [complained-of] plebiscite

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[1] The reference is to Article 4 (1) of the Charter:

> "Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations."

As construed in *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 57, at p. 62.

[2] Resolution 1608 (XV) of 21 April 1961.

> was null and void. In paragraphs numbered 2 and 3 of resolution 1608 (XV), the General Assembly rejected the Cameroon plea. Whatever the motivation of the General Assembly in reaching the conclusions contained in those paragraphs[1], whether or not it was acting wholly on the political plane and without the Court finding it necessary to consider here whether or not the General Assembly based its action on a correct interpretation of the Trusteeship Agreement, there is no doubt — and indeed no controversy — that the resolution had definitive legal effect . . .
>
> If the Court were to decide that it can deal with the case on the merits, and if thereafter, following argument on the merits, the Court decided, *inter alia*, that the establishment and the maintenance of the administrative union between the Northern Cameroons and Nigeria was a violation of the Trusteeship Agreement, it would still remain true that the General Assembly, acting within its acknowledged competence, was not persuaded that either the administrative union, or other alleged factors, invalidated the plebiscite as a free expression of the will of the people . . .
>
> If the Court were to proceed and were to hold that the Applicant's contentions were all sound on the merits, it would still be impossible for the Court to render a judgment capable of effective application. *The role of the Court is not the same as that of the General Assembly. The decisions of the General Assembly would not be reversed by the judgment of the Court.*" (*Ibid.*, at pp. 32-33 (italics added).)

The Court has similarly recognized that one organ of the United Nations cannot exercise the authority expressly vested in another co-ordinate organ by the Charter[2].

497. The Court should be guided by the foregoing considerations and, as a consequence, should hold the Nicaraguan Application of 9 April to be inadmissible. The United States has demonstrated that the necessary effect of the Nicaraguan Application is to require the Court to determine that the alleged activities of the Respondent constitute an unlawful use of armed force amounting to a threat to the peace, a breach of the peace or an act of aggression within the meaning of the Charter. Such matters are expressly confided to the political organs and, as will be demonstrated, those organs have acted, and are acting, in respect of virtually identical claims placed before them by Nicaragua. Any

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[1] The cited paragraphs provide as follows:

"*[The General Assembly]*

2. *Endorses the results of the plebiscites that:*

(a) The people of the Northern Cameroons have, by a substantial majority, decided to achieve independence by joining the independent Federation of Nigeria;
(b) The people of the Southern Cameroons have similarly decided to achieve independence by joining the independent Republic of Cameroon;

3. *Considers that*, the people of the two parts of the Trust Territory having free and secretly expressed their wishes with regard to their respective futures in accordance with the General Assembly resolutions 1352 (XIV) and 1473 (XIV), the decisions made by them through democratic processes under the supervision of the United Nations should be immediately implemented."

[2] *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, at p. 9. See also, *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, at p. 49.

judgment on the merits by the Court could neither invalidate the conclusions reached by those organs, nor the actions consequently taken by them.

B. The Memel *and* Minority Schools *Cases Are not Relevant to the Issue before the Court*

498. The reliance in the Nicaraguan Memorial on certain prior decisions of this Court and its predecessor in this regard is misplaced. Two of the decisions relied on, *Memel*[1] and *Minority Schools*[2], are decisions of the Permanent Court of International Justice which, unlike this Court, was not an organ of a general international organization and was consequently under no comparable institutional constraints with respect to the exercise of its judicial functions. Moreover, in neither case was the subject-matter one which had been confided to the competence of another organ. Indeed, in both cases, the subject-matter had been expressly put before the Court by special agreement.

499. The question in *Memel* was confined to the interpretation of Article 17 of the Convention of Paris of 24 May 1924 concerning the Territory of Memel. The case concerned whether the parties to that instrument had intended Article 17 thereof to establish reference of "any infraction" of the Convention to the Council of the League of Nations as a *conditio sine qua non* to the reference of any difference of opinion regarding "questions of law or of fact concerning" the Convention to the Permanent Court. The Court closely examined the text of the provision at issue and concluded that there was nothing therein "to show that it was the intention of the Parties to make proceedings before the Council a condition precedent to proceedings before the Court" (*Memel, op. cit.*, at p. 248). Moreover, the Court carefully noted that —

> "[t]he actual text of Article 17 shows that the two procedures relate to different objects. The object of the procedure before the Council is the examination of an 'infraction of the provisions of the Convention', which presuppose an act already committed, whereas the procedure before the Court is concerned with 'any difference of opinion in regard to questions of law or fact'. Such difference of opinion may arise without any infraction having been noted. It is true that one and the same situation may give rise to proceedings either before the Council under the first paragraph, or before the Court under the second; but that will not always be the case, and this suffices to prove that the two procedures are not necessarily connected with one another." *(Ibid.)*

The narrowness of the Court's inquiry is underscored by the final paragraph of its decision, in which the Court

> "desires to emphasize that nothing that it said in this judgment is to be regarded as prejudging in any way the interpretation of the jurisdictional clauses in [other minority treaties]" (*ibid.*, at p. 253).

500. The Court's decision in *Minority Schools* is to comparable effect. That case involved the construction of certain provisions of the Polish-German Geneva Convention of 15 May 1922, one of which provided that "any difference of opinion as to questions of law or fact arising out of these articles" would be

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[1] *Interpretation of the Statute of the Memel Territory, Preliminary Objection, Judgment, 1932, P.C.I.J., Series A/B, No. 47*, p. 243.

[2] *Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, 1928, P.C.I.J., Series A, No. 15.*

submitted, on the demand of one of the parties, to the Permanent Court. Germany made such a demand, and both parties entered written pleadings. It was only in its rejoinder, however, that Poland objected to the jurisdiction of the Court. The Court held that Poland had submitted to the jurisdiction of the Court by its previous filings on the merits (*Minority Schools*, *op. cit.*, at p. 24). In respect of Poland's untimely jurisdictional objection the Court observed:

> "The Court's jurisdiction depends on the will of the Parties. The Court is always competent once the latter have accepted its jurisdiction, since there is no dispute which States entitled to appear before the Court cannot refer to it. Article 36 of the Statute, in its first paragraph, established this principle in the following terms:
>
> > 'The jurisdiction of the Court comprises all cases which the Parties refer to it and all matters specially provided for in treaties and conventions in force.'
>
> This principle only becomes inoperative in those exceptional cases in which the dispute which States might desire to refer to the Court would fall within the exclusive jurisdiction reserved to some other authority. That, however, is not the position in the present suit; for the jurisdiction possessed by the Council of the League of Nations under Articles 147 and 149 of the Geneva Convention to decide upon individual or collective petitions, is entirely distinct from, and in no respect restricts, the Court's jurisdiction to hear and determine disputes between States." (*Ibid.*, at p. 23.)

As in *Memel*, the Court in *Minority Schools* emphasized that in fact no question of conflicting competencies was involved, in that the subject-matters of each were distinct.

501. Moreover, both *Memel* and *Minority Schools* involved the jurisdiction of the Permanent Court to entertain questions submitted under Article 36 (1) of its Statute, rather than Article 36 (2) (the so-called "optional clause"). The fact that the parties had previously consented, by special agreement, to the exercise by the Court of a specific subject-matter jurisdiction is a fundamental distinction from the present case, in which the Applicant is seeking to derive the existence of a specific subject-matter jurisdiction from the general language of Article 36 (2) of the Statute of this Court, notwithstanding the express allocation of such matters to the political organs under the United Nations Charter and the absence of jurisdiction over either Party.

C. *The* Diplomatic and Consular Staff *Case Does not Establish the Competence of the Court to Adjudicate Nicaragua's Claims*

502. The Nicaraguan Memorial fundamentally misconstrues the decision of this Court in the *United States Diplomatic and Consular Staff* case[1]. The Court in that case was at no time called upon to adjudicate an on-going use of armed force alleged to be contrary to the Charter, nor any other matter committed to the competence of the Security Council or any other co-ordinate organ of the United Nations, or that was otherwise under consideration in those fora.

503. On 4 November 1979 the United States Embassy in Tehran was seized and its entire United States staff taken hostage. Repeated appeals to the Iranian Government for the release of the hostages were unavailing and, on 29 November

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[1] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3.

1979, the United States instituted proceedings before this Court, not under Article 36 (2) of the Statute of the Court, but under Article 36 (1). In doing so, the United States claimed violations of Iran's obligations under several bilateral or multilateral instruments, each of which provided specifically for the submission of disputes arising thereunder to the jurisdiction of the Court[1]. The United States application was accompanied by a request for an indication of provisional measures of protection[2].

504. Oral proceedings were held on that request on 10 December 1979. During the course of those proceedings, the United States took pains to emphasize that the legal claims of the United States were grounded solely in the aforementioned international agreements and their respective compromissory clauses, and to stress that no question of the unlawful use of force under Article 2 (4) of the Charter of the United Nations was before the Court[3]. On 15 December 1979, the Court indicated provisional measures to the effect, *inter alia*, that "[t]he Government of the Islamic Republic of Iran should ensure the immediate release" of United States diplomatic and consular personnel being held hostage in Tehran[4].

505. On 9 November 1979, the United States addressed a letter to the President of the Security Council, calling the attention of the Council to Iran's actions in seizing the United States Embassy and holding its personnel hostage as violative of "the very basis for the maintenance of international peace and security and of comity between States[5]." On 25 November 1979, the Secretary-General, in the exercise of his authority under Article 99 of the Charter, addressed a letter to the President of the Security Council in which he expressed his opinion that the "dangerous level of tension" between the United States and Iran posed "a serious threat to international peace and security[6]". On 4 December 1979 the Security Council adopted resolution 457 (1979), noting the Council's deep concern that that tension "could have grave consequences for international peace and security", calling upon Iran to release the hostages, and upon both the United States and Iran "to take steps to resolve peacefully the remaining issues between them".

506. Iran did not honor the Court's Order of 15 December 1979 and, at the request of the United States, the Security Council met again in late December 1979 to consider measures to induce Iran to comply with its international obligations. On 31 December 1979, the Security Council adopted resolution 461 (1979) which, *inter alia*, expressly took into account the Court's 15 December 1979 Order and deplored the continued detention of the hostages notwithstanding that Order and Security Council resolution 457 (1979). That resolution also encompassed a decision to meet subsequently "to review the situation and, in

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[1] *I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran*, p. 3. The agreements in question were (1) the Vienna Conventions on Diplomatic and Consular Relations, and the Optional Protocols to both, (2) the United States-Iran Treaty of Amity, Economic Relations and Consular Rights of 1955, and (3) the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents.

[2] *Ibid.*, at p. 9.

[3] *I.C.J. Pleadings, op. cit.*, at p. 24 (oral argument of Counsel for the United States).

[4] *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 7.

[5] *SCOR*, 34th Yr., *Supplement for October, November and December 1979*, p. 61 (doc. S/13615).

[6] *SCOR*, 34th Yr., *Supplement for October, November and December 1979*, p. 83 (doc. S/13646).

the event of non-compliance with this resolution, to adopt effective measures under Articles 39 and 41 of the Charter of the United Nations".

507. It is therefore clear that the questions before the Court arose under specific treaty obligations, none of which related in and of itself to the maintenance of international peace and security or to any question concerning the lawfulness of the use of force[1], and all of which could be adjudicated without reaching any legal or factual determination confided by the Charter to the competence of the Security Council. The Council, on the other hand, had before it a dispute which, for reasons separate from the legal questions before the Court, threatened the maintenance of international peace and security and could be dealt with on that basis[2]. Moreover, it was also quite clear that no action by the Court in favour of the United States legal claims would have been inconsistent with the actions taken by the Security Council; indeed, the Security Council took specific note of the Order of 15 December 1979 indicating provisional measures in its resolution 461 (1979), and called upon Iran to comply with that Order. The Court took this into account[3]. A subsequent judgment on the merits in favour of the United States would not have been in conflict with that resolution or with any other action of the Council already taken[4].

508. There is yet another distinguishing factor between the *Diplomatic and Consular Staff* case and the present case. In the former case the Court was faced with a naked assertion by Iran, neither briefed nor argued to the Court, that its seizure of the United States Embassy and staff was but a part of an "overall problem" involving what was alleged to be "more than 25 years of continual interference by the United States in the internal affairs of Iran[5]". The Court quite properly rejected that vague and unsupported assertion as a bar to its exercise of jurisdiction[6].

509. More fundamentally, the Court in the *Diplomatic and Consular Staff* case was at no point called upon to adjudicate an alleged on-going use of armed force contrary to the Charter, nor any other matter falling within the competence of the political organs. The United States neither claimed, nor called upon the Court to determine, that such a situation existed. The legal claims put before the Court by the United States were wholly independent of its appeal to the Security Council for the assistance of that organ in achieving, by peaceful means, a resolution of a dispute that threatened the maintenance of international peace and security; the two organs could act concurrently without infringing each other's responsibilities under the Charter. No third States not present before the Court were involved.

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[1] The Court explicitly acknowledged this in commenting upon the United States unsuccessful rescue attempt on 24 April 1980 (*Judgment, op. cit.*, at p. 44).

[2] Cf. the uncontested statement made before the Security Council on 4 December 1979 by the Permanent Representative of the United States to the effect that

> "[n]either the United States nor any other Member intends that the adoption of [resolution 457 (1979)] shall have any prejudicial impact whatever on the request of the United States for the indication of provisional measures of protection by the International Court of Justice" (*SCOR*, 34th Yr., 2178th Mtg., para. 23; see also *I.C.J. Pleadings, op. cit.*, at p. 34).

[3] *Judgment, op. cit.*, at p. 21.

[4] In this regard it is worthy of note that the fact-finding Commission set up by the Secretary-General pursuant to Security Council resolution 457 (1979) did "not address itself to the claims submitted by the United States to the Court" (*Judgment, op. cit.*, at p. 22).

[5] *Ibid.*, at p. 19.

[6] *Ibid.*, at p. 20.

510. By contrast, the claims asserted by Nicaragua before this Court are indistinguishable from the claims asserted by Nicaragua in the Security Council. The Court cannot adjudicate upon the Nicaraguan Application without dealing with the very claim that was *not* before the Court in the *Diplomatic and Consular Staff* case — a claim of an on-going use of armed force contrary to the Charter, a claim which is confided by the Charter to the political organs.

Section II. Nicaragua Is Requesting that the Court Review Decisions Already Taken by the Political Organs

511. On 4 April 1984 — five days before Nicaragua moved to institute proceedings in this Court — Nicaragua presented essentially identical claims before the Security Council (Application, para. 12). A draft resolution corresponding to those claims failed to achieve the requisite majority for adoption under Article 27 (3) of the Charter. The Application constitutes a request that this Court hand down a determination that the Security Council, in the proper exercise of its functions under the Charter, did not make. Nicaragua is thus calling upon this Court to serve in the nature of an appellate tribunal over decisions taken by a co-ordinate organ of the United Nations acting within its designated competence under the Charter. These efforts should be rejected *(Northern Cameroons, op. cit.)*.

512. Nor should Nicaragua be heard to argue that the failure of its claims to attain the requisite support in the Security Council, or that the perceived likelihood that similar claims in the future would fail to secure the majority specified in the Charter for Security Council action, vests this Court with subject-matter jurisdiction over the Application. The architects of the Charter system, in delegating to the Security Council and to regional arrangements the responsibility for dealing with circumstances such as those alleged by Nicaragua, did so with the clear and deliberate knowledge of the procedures that they chose to prescribe for Security Council action, both as to the political nature of the decision-making process and to the majority required[1].

513. Nicaragua may find the fact that the decision-making process established by the Charter for dealing with on-going armed conflict functions as it was designed to function to be a source of dissatisfaction, as it may be to any other member State, including the United States, whose requests are not satisfied. But that alone cannot be an adequate basis for the assumption of subject-matter jurisdiction by the Court (*South West Africa, op. cit.*, at p. 46). Adjudication of Nicaragua's claims would place the Court in the position of reviewing, at the behest of a Member State, the acts of a co-ordinate organ of the United Nations system. A party to an alleged dispute, having failed to obtain the action it desires from the Security Council, cannot thereupon turn to this Court and submit for adjudication substantially identical claims, without necessarily asking for a judgment that, in so far as it would be binding on the parties under Article 94 (1) of the Charter, would effectively render the Council's previous action

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[1] See generally Russell, *op. cit.*, at pp. 713 ff.; Krylov, *op. cit.*, at pp. 169 ff.; 11 *UNCIO*, pp. 232-238, 304-362, 487-495. Nicaragua was among those delegations at San Francisco that voted against efforts to modify what became Article 27 (3) of the Charter (*Summary Report of the Nineteenth Meeting of Committee III/1*, doc. 956/III/1/47, 11 *UNCIO*, p. 486, at p. 495).

"nugatory[1]". It must be emphasized that these difficulties inhere in the substance of the Nicaraguan allegations; they cannot be cured through mere artful pleading.

514. Rejection by the Court of the unique and unprecedented burden that Nicaragua seeks to thrust upon it would not affect its continued ability to play a significant role under the Charter in relation to the maintenance of international peace and security. The functions of the Court in connection with pacific settlement under Articles 33 and 36 (3) of the Charter, the rendering of advisory opinions at the request of the political organs under Article 96 of the Charter, and its power to adjudicate contentious claims regarding specific legal issues not involving resolution of on-going uses of force alleged to be contrary to the Charter *(Diplomatic and Consular Staff, op. cit.)*, or that related to past occurrences *(Corfu Channel, op. cit.)*, would in no way be jeopardized.

Section III. Article 51 of the Charter Precludes Impairment of the Inherent Right of Individual and Collective Self-Defense

515. As previously shown, Nicaragua is, in effect, demanding that the Court adjudicate a claim of "aggression" or, at the very least, a claim of the on-going use of armed force contrary to the Charter in or against Nicaragua. In order to reach any such determination, however, the Court must necessarily decide that the alleged actions by the United States and other States, not present before the Court, are in fact unlawful. More specifically, the Court would necessarily have to decide whether or not the countervailing claims of the exercise of the right of individual or collective self-defence are without merit, or that the right recognized and guaranteed by Article 51 of the Charter in this regard is not implicated. Indeed, Nicaragua has attempted to avoid this problem by implicitly claiming that the United States enjoys no such "inherent right" in the present case[2]. This, however, merely begs the question, since its validity would inevitably depend

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[1] Rosenne, *loc. cit.* It would be difficult to speculate on the consequences should a victorious applicant in such a case thereafter bring its judgment to the Security Council for enforcement under Article 94 (2) of the Charter, beyond noting the potentially serious damage to the prestige and effectiveness of both co-ordinate organs (cf. O. Lissitzyn, *The International Court of Justice: Its Role in the Maintenance of International Peace and Security*, p. 96 (1951)). The amendment proposed by Belgium at San Francisco to allow a member State to seek an advisory opinion concerning a decision of the Security Council was rejected, for similar reasons (see *supra*, para. 476, n. 4).

[2] At **I**, p. 62. Nicaragua does so by asserting that there exists no "armed attack" giving rise to the inherent rights recognized and guaranteed by Article 51. The excessively narrow construction of the phrase "if an armed attack occurs" advanced by counsel for Nicaragua suggests that a State is entitled to the exercise of its Article 51 rights only when faced with a conventional, cross-border military assault. Nicaragua would thus deny to States the right under Article 51 to engage, individually and collectively, in proportionate measures to respond to unlawful uses of force having different, less conventional, characteristics. This is a distinctly minority view (see, e.g., D. Bowett, *Self-Defence in International Law*, pp. 187-193 (1958); I. Brownlie, *International Law and the Use of Force by States*, pp. 365-376 (1963); M. McDougal and F. Feliciano, *Law and Minimum World Public Order*, pp. 223 ff. (1961). See also the discussion of the question of counter-measures in respect of internationally wrongful acts falling short of an "armed attack" in the *Report of the International Law Commission on the Work of Its Thirty-First Session*, *GAOR*, 34th Sess., Supp. No. 10 (doc. A/34/10)). It is in any event the case that competing claims regarding the lawfulness of individual and collective measures taken in response to an on-going use of armed force are reserved by the Charter for determination by the political organs, in particular the Security Council (as the express language of Article 51 itself makes clear).

upon the adjudication of an Article 51 claim in the midst of the alleged on-going armed conflict, a matter that is confided by the Charter to the Security Council.

516. It is well settled that the right of individual or collective self-defence is an inherent right of States[1]. The special and extraordinary nature of the right of individual or collective self-defense is explicitly recognized in the prescription of Article 51 that "[n]othing in the present Charter shall impair" that right. Article 92 of the Charter makes the Court an "organ of the United Nations", and further provides that that Statute of the Court is an "integral part" of the Charter. Action taken by the Court is therefore a matter under the Charter, and any such action that had the effect of impairing the inherent right of a State to engage in individual or collective self-defense cannot be reconciled with the express language of Article 51, which provides a role in such matters only to the Security Council. Article 51 permits only the Security Council to take action with respect to claims of self-defense, and a judgment on the question by the Court would constitute an entry into the field of competence reserved to the Council in this regard.

517. A judgment of the Court that purported to deny the validity of a State's claim to be engaged in self-defense whether individually or collectively, must necessarily "impair" the "inherent" right guaranteed to that State by Article 51 of the Charter. To the extent that that State claims, as does the United States here, to be engaged in particular in the exercise of the inherent right of self-defense by providing, upon request, proportionate and appropriate assistance to third States not before the Court, any such judgment would necessarily impair the inherent rights guaranteed to those third States as well. The relief claimed by Nicaragua (Application, para. 26), in particular the denial of assistance to third States, would have precisely this result.

518. A judgment of the Court could not at once be incompatible with Article 51 of the Charter, and binding on the parties under Article 94 of the Charter and Article 59 of the Statute of the Court. Such a contradictory result could not have been intended by the architects of the Charter, whose clear design was to leave the resolution of on-going armed conflict to the exclusive competence of the political organs.

519. It is, moreover, unnecessary for an adjudication of a Party's Article 51 claims to proceed to judgment for that Party's inherent right of individual and collective self-defense to be impaired. The fact that such claims are being subjected to judicial examination in the very midst of the conflict that gives rise to them may alone be sufficient to constitute such impairment. This is particularly the case where, as here, the Party instituting proceedings has evidently done so for the purpose of securing political and other extra-legal advantages in order to further its own aims in respect of the underlying conflict. An eventual judgment in the other Party's favor could not restore the impairment that its interests may have undergone in the interim. The Court should not admit such an abuse of the judicial process.

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[1] In the present case there is no claim in connection with Article 51 that the Security Council has not been made aware of the situation claimed by Nicaragua to exist in Central America, and indeed such a claim would be inconsistent with Nicaragua's own allegations (Application, para. 12). The Council has debated the conflict in Central America on several occasions and, in resolution 530, discussed *infra*, has acted upon it.

CHAPTER IV

THE JUDICIAL PROCESS IS INHERENTLY INCAPABLE OF RESOLVING ON-GOING ARMED CONFLICT

520. Bearing in mind that, at this stage in the proceedings before the Court, the Parties must address the issues raised in the Application without regard to their truth or to other issues on the merits, the Application alleges an on-going armed conflict involving the use of armed force contrary to the Charter. That allegation is central to, and inseparable from, the Application as a whole, and is one with which a court cannot deal effectively without overstepping proper judicial bounds.

521. The following arguments, while distinct from the previous arguments concerning the Charter's allocation of functions among the various organs of the United Nations, are yet related to them. As has been shown[1], the overriding concern of the framers of the Charter was to devise mechanisms for dealing with situations of on-going armed conflict that were both swift and effective. To that end, they deliberately chose to assign functional responsibility for such matters to the political organs, and in particular to the Security Council. They did so at least in part in recognition of the inherent limitations of the judicial function in settling such situations.

Section I. The Nature of the Judicial Function Precludes Its Application to the Substance of Nicaragua's Allegations

522. The nature of the judicial function is, first and foremost, the evaluation of competing legal claims by means of the application of settled legal principles to facts that are both provable in law and of sufficient stability to permit the definitive resolution of those legal claims. The judicial process is capable of addressing a pattern of legally relevant facts only if that pattern is discernible by the means available to the adjudicating tribunal, establishable in conformity with applicable norms of evidence and proof, and not subject to further material evolution during the course of, or subsequent to, the judicial proceedings.

523. The resort to force during on-going armed conflict almost invariably lacks precisely the foregoing attributes. The pattern of facts necessary to the achievement of a legal conclusion, and to an effective resolution of the conflict itself, is incapable of judicial ascertainment through the technical and formal procedures and evidentiary standards applicable to proofs at law. None of the parties to such a conflict can be expected to be prepared to disclose to a court potentially probative information that it determines that it must strictly control for reasons of national security. Information concerning the intentions or actions of one or another of the parties to an on-going armed conflict derived from third parties would invariably have little or no probative value; newspaper accounts concerning what may or may not be taking place are inherently unsatisfactory even as historical, let alone legal, evidence. Eyewitness accounts to armed

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[1] See, *inter alia*, the discussion of the history of Article 1 (1) of the Charter, *supra*.

hostilities are invariably and inevitably colored by subjective factors that render such testimony fundamentally untrustworthy regardless of the good faith of the deponent[1]. These difficulties apply regardless of the nature of the on-going armed conflict; they are greatly exacerbated in situations such as that alleged in the Nicaraguan Application. There, a State is alleged to be engaging in covert support of groups engaged in uses of military forces, which groups have their own motivations and are not part of the regular armed forces of any State. The State making such allegations rigidly controls virtually all aspects of its society, including in particular the dissemination and availability of any and all information concerning that State's own activities[2].

524. In addition, for the legal significance of such "facts" to be determined — in other words, for them to serve as the basis for a judicial determination of the respective rights and duties of the parties to an alleged armed conflict — a sufficiently coherent and legally static pattern of facts must be found to exist. The validity and applicability of any legal conclusion extends only as far as its factual predicate; rights and duties can be determined only with reference to facts proven to exist at a point in time that is either contemporaneous with or anterior to the judgment. Such a determination can therefore have no necessary application with respect to facts that may develop subsequently; the principle of *res judicata* is inherently retrospective. Hence the judicial process is unsuited to dealing with situations that are by their nature exceptionally fluid.

525. It is for reasons such as the foregoing that on-going armed conflict must be confided to resolution by political processes, as it has been by the Charter. The political process, unlike the judicial process, is not constrained by inherent institutional limitations regarding, *inter alia*, the nature and quality of evidence, and can, moreover, employ techniques such as diplomatic investigation[3]. In addition, the political process is not limited, as is a court, in the scope of its enquiry or in the range of possible solutions. Its function is analogous to that of a policeman, whose first duty is to restore and maintain order without determining legal fault, rather than to that of a court, whose duty is to assign legal responsibility after the fact, on the basis of a formally-proved and closed set of facts[4].

Section II. The Situation Alleged in the Nicaraguan Application cannot Be Judicially Managed or Resolved

526. The effectiveness of any judgment of the Court does not depend solely on its binding nature under Article 94 of the Charter and Article 59 of the

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[1] The Court itself has recognized these fundamental difficulties, in particular the doubtful probative value of "eyewitness" testimony, in its judgment in the *Corfu Channel* case (*op. cit.*, at pp. 13-18). It will be recalled that the Court in *Corfu Channel* was dealing, not with a situation involving the on-going use of armed force, but with events that transpired in their entirety some eight months before the institution of proceedings before the Court, and more than two-and-a-half years prior to the Court's decision on the merits.

[2] This presents yet another factor distinguishing this case from the *United States Diplomatic and Consular Staff* case, *supra*. In that case, respondent Iran, although given the opportunity to do so, made no effort to deny or otherwise contest any of the material facts alleged against it by the United States (*Judgment*, *op. cit.*, at p. 10). The Court was thus relieved of any burden of determining the probative value of factual allegations made by an authoritarian State.

[3] Cf. *United States Diplomatic and Consular Staff*, *op. cit.*, at pp. 20, 23.

[4] Cf. the evolution of Article 1 (1) of the Charter and the Security Council debates over the Corfu Channel incident, *supra*.

Statute. A judgment must also be capable of being executed by the parties in a manner that ensures that its purpose is achieved. A decision on a question of law can only guide the conduct of the parties if the parties have a clear and workable understanding of what practical measures are thereby required of them. In the vast majority of cases, those measures are both self-evident and inherent in the judgment itself, for example, the release of persons held hostage *(United States Diplomatic and Consular Staff)* or the payment of a certain sum in damages or as reparations *(Corfu Channel)*. The more complex and uncertain the circumstances to which the judgment is directed, however, or the more critical the interests involved or the consequences of error, the greater the possibility of failure regardless of the good faith of the parties.

527. The Court has recognized that giving such practical guidance to the parties lies outside the proper scope of the judicial function (*Haya de la Torre, Judgment, I.C.J. Reports 1951*, p. 71, at p. 79). Such guidance is, however, critical to the effective control of situations of armed conflict such as that alleged to exist in the Nicaraguan Application[1]. Assuming, *arguendo*, that adjudication of Nicaragua's claims results in a judgment granting the relief sought by Nicaragua, the Court could not exercise the continuous supervision and direction that would be required to assist the parties in giving effect to such a judgment. Nor does the Court command the personnel, financial and other resources that would be necessary.

528. In addition, it must be recalled that the circumstances alleged in the Nicaraguan Application involve the activities of groups indigenous to Nicaragua that have their own motivations and that are beyond the control of any State. A judgment granting to Nicaragua the relief prayed for against the United States would not, and could not, have any effect on the alleged activities of such groups. Nicaragua, by seeking to portray the matter as one arising solely between Nicaragua and the United States, gives a seriously misleading impression concerning the true nature of the armed conflict alleged to be in progress and of its amenability to settlement by a judgment of this Court.

529. As provided in the Statute of the Court, any judgment of the Court is binding only upon the States parties to the case before it, and only in respect of that case (Statute, Art. 59). Third States, whose interests could be affected, but not determined, by the judgment would be able to carry on the conflict. A State in whose favor judgment was rendered could, if it chose, seek to gain immediate advantage by bringing unlawful force to bear against those third States. Whether or not the successful party chose to take advantage of that success in such fashion, there can be no assurance that the Court's intervention would have any material impact on the continuation of the conflict.

530. Moreover, the judgment of the Court could not, consistent with Article 51 of the Charter, impair the inherent right of individual or collective self-defense enjoyed by the State against whom judgment was rendered. Even if it is assumed, *arguendo*, that the Court has the competence to deny that State's Article 51 claims with respect to events transpiring prior to the Court's judgment, there can be no doubt that that judgment could not operate to preclude that State's subsequent exercise of the inherent rights guaranteed by that Article[2]. Conversely,

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[1] See generally, D. Bowett, *United Nations Forces: A Legal Study of United Nations Practice* (1964) for a comprehensive exposition of the myriad factors involved.

[2] For example, a State whose conduct was enjoined by the Court on the basis of events occurring as of a certain date would nonetheless not be constrained from responding under Article 51 to requests for assistance arising subsequent to that date, based on events taking place subsequent to that date.

it is in the nature of things that a State in whose favor the Court has given judgment is likely to portray such a judgment as a vindication of its legal position not only with respect to the unsuccessful State but also with respect to third States not before the Court. Thus, a judicial determination on the lawfulness of the use of armed force by a party to an on-going armed conflict would impose an artificial, but politically powerful, disadvantage upon other parties to that conflict.

Section III. The Conclusion that the Court cannot Judicially Determine the Matters Alleged in the Nicaraguan Application Does not Mean that International Law Is neither Relevant nor Controlling

531. To conclude that the Court cannot adjudicate the merits of the complaints alleged in the Nicaraguan Application does not require the conclusion that international law is neither directly relevant nor of fundamental importance in the settlement of international disputes. It merely means that the application of international legal principles, including those established by or enshrined in the Charter of the United Nations, to the resolution of on-going armed conflicts is the responsibility of other organs set up under the Charter to deal with such situations. As Lauterpacht observed with respect to limitations on the judicial function in municipal legal systems:

> "Here as elsewhere care must be taken not to confuse the limitation upon the unrestricted freedom of judicial decision with a limitation of the rule of law . . . [T]he limitations upon the freedom of judicial decision, far from amounting to a suspension of the rule of law, are the expression of a differentiation of functions . . ." (*The Function of Law in the International Community*, p. 389 (1933).)

Lauterpacht's point is of even greater relevance to the less-structured international system. The Court possesses broad, but not plenary, jurisdiction, and is not the only organ of the United Nations competent to apply international law to disputes between or among Member States, or to interpret the Charter of the United Nations[1]. Nicaragua would have this Court assume a burden that is without either precedent or foundation. The Nicaraguan Application should be dismissed.

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[1] Cf. *Competence of the General Assembly for the Admission of a State to the United Nations*, *op. cit.*, at p. 9; Kopelmanas, *op. cit.*, at p. 201 and note.

Lauterpacht's observations concerning the absence of "machinery . . . for a legal regulation of the recourse to self-defence" in the Pact for the Renunciation of War of 27 August 1928, 94 *LNTS*, p. 57, are of direct relevance to the point:

> "Such a machinery exists in the Covenant of the League of Nations. A power of this nature is, for instance, exercised by the Council or Assembly of the League of Nations in determining whether there has been a violation of Article 12 of the Covenant obliging States not to go to war before having recourse to the machinery provided in the Covenant . . . [T]he Council of the League is entitled to determine whether the recourse to force not intended as war is contrary to the provisions of Article 12, 13, or 15 of the Covenant. Such determinations would necessarily include a judicial expression of opinion on the admissibility, in a given case, of the principle of self-defence. In general, the Council and the Assembly of the League provide a possibility for evolving not only a moral but a legal judgment on the observance of the provisions of the Covenant as to recourse to war." (*Op. cit.*, at p. 182, n. 2.)

Lauterpacht wrote, of course, prior to the establishment of the more highly-developed system of the Charter for the resolution of such questions, with respect to which his observations, *mutatis mutandis*, apply with even greater force.

CHAPTER V

THE NICARAGUAN APPLICATION IS INADMISSIBLE BECAUSE THE ESTABLISHED PROCESSES FOR RESOLUTION OF THE OVERALL ISSUES OF CENTRAL AMERICA HAVE NOT BEEN EXHAUSTED

Section I. The Contadora Process, to which Nicaragua Is Party, Is Recognized, both by the Political Organs of the United Nations and by the Organization of American States, as the Appropriate Method for the Resolution of the Issues of Central America

532. The phrase "Contadora process" refers to the comprehensive diplomatic initiative undertaken by the countries of the region to address the overall security, political, social and economic problems of Central America. It derives its name from the meeting of the Foreign Ministers of Mexico, Panama, Colombia and Venezuela that took place at Contadora Island, Panama, in January of 1983 with a view to developing a framework within which those Governments, and those of the five Central American States, including Nicaragua, could achieve a regional solution to the security and other, interrelated, problems besetting Central America[1]. The ensuing Contadora process was recognized by the Security Council of the United Nations as the appropriate mechanism for seeking the resolution of those problems by its resolution 530 (1983), adopted unanimously on 19 May 1983[2]. That resolution provides in its pertinent operative paragraphs as follows:

> "*[The Security Council,]*
>
> 1. *Reaffirms* the right of Nicaragua and of all the other countries of the area to live in peace and security, free from outside interference;
>
> 2. *Commends* the efforts of the Contadora Group and urges the pursuit of those efforts;
>
> 3. *Appeals* urgently to the interested States to co-operate fully with the Contadora Group, through a frank and constructive dialogue, so as to resolve their differences; [and]
>
> 4. *Urges* the Contadora Group to spare no effort to find solutions to the problems of the region and to keep the Security Council informed of the results of these efforts . . ."

The United States voted in favor of Security Council resolution 530 (1983), and has otherwise strongly supported the Contadora process from its very inception. The United States is now engaged in bilateral discussions with Nicaragua designed to support the Contadora process (Part II, *supra*).

533. The Contadora process has also been recognized by the United Nations General Assembly as an appropriate regional mechanism. On 11 November 1983 the Assembly adopted, without vote, resolution 38/10, which in its pertinent operative paragraphs provides as follows:

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[1] A more detailed exposition of the origins and nature of the Contadora process can be found in Part II of this Counter-Memorial.

[2] The full text of resolution 530 (1983) is attached at Ann. 101.

> "*[The General Assembly,]*
>
> 4. *Urges* the States of the region and other States to desist from or to refrain from initiating, military operations intended to exert political pressure, which aggravate the situation in the region and hamper the efforts to promote negotiations that the Contadora Group is undertaking with the agreement of the Governments of Central America;
>
> . . . .
>
> 5. *Expresses its firmest support* for the Contadora Group and urges it to persevere in its efforts, which enjoy the effective support of the international community and the forthright co-operation of the interested countries in or outside the region."

534. Similar action was taken by the General Assembly of the Organization of American States, which on 18 November 1983 adopted resolution AG/RES. 675 (XXII-0/83), in order "to express its firmest support for the efforts of the Contadora Group and to urge it to persevere in its efforts[1]".

535. The foregoing actions by the political organs of both the United Nations and the Organization of American States constitute clear recognition of the Contadora process as the appropriate mechanism by which resolution of the security and other problems of Central America is to be sought. As will be demonstrated, the Court cannot adjudicate the merits of the Nicaraguan Application without frustrating the expressed will of those organs.

Section II. The Contadora Process Has Adopted, among Its Aims, Principles Directed to the Very Claims and Issues Raised by the Nicaraguan Application

536. The Contadora process has achieved agreement among the States of the region, including Nicaragua, on aims which go to the very heart of the claims and issues raised by the Application. Nicaragua in its Memorial concedes this fundamental point, but in a way that seeks to mask its actual significance (para. 220).

537. On 17 July 1983, the Contadora Group met at Cancún, Mexico, and issued a declaration proposing to the five Central American States the adoption of a comprehensive agenda to deal with the security, economic, social, political and compliance issues facing the region. Nicaragua responded with proposals of its own which, while concentrating almost entirely on security issues, did accept the need to address such problems on a regional basis. The other four Central American States offered an eight-point plan covering the entire range of issues addressed by the proposals of the Contadora Group, emphasizing both security concerns and the need for the development of democratic and representative institutions throughout the region.

538. These three sets of proposals were considered together by all nine governments. Meeting in Panama from 7 to 9 September 1983, the governments achieved agreement on a set of 21-point Document of Objectives, constituting the first agreed, comprehensive listing of the issues and principles to serve as the basis for regional peace, and to establish the framework for the negotiation of implementing agreements on a wide range of social, political, economic and security issues and providing for effective verification[2]. The stated objectives

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[1] The full texts of resolutions 38/10 and AG/RES. 675 (XXII-0/83) are attached at Anns. 93 and 94, respectively.

[2] The full text of the Document of Objectives can be found as an attachment to Ann. 92.

focus on the need for an end to external support for terrorism, subversion and destabilization; for national reconciliation and respect for political and civil rights; for reduction of foreign military presences and of levels of national armed forces; and for renewed economic co-operation. The following objectives are among those agreed upon by the nine governments:

> "To create political conditions intended to ensure the international security, integrity and sovereignty of the States of the region;
>
> To stop the arms race in all its forms and begin negotiations for the control and reduction of current stocks of weapons and on the number of armed troops;
>
> To prevent the installation on their territory of foreign military bases or any other type of foreign military interference;
>
> To conclude agreements to reduce the presence of foreign military advisers and other foreign elements involved in military and security activities, with a view to their elimination;
>
> To establish internal control machinery to prevent the traffic in arms from the territory of any country in the region to the territory of another;
>
> To eliminate the traffic in arms, whether within the region or from outside it, intended for persons, organizations or groups seeking to destabilize the Governments of the Central American countries;
>
> To prevent the use of their own territories by persons, organizations or groups seeking to destabilize the Governments of Central American countries and to refuse to provide them with or permit them to receive military or logistical support;
>
> To refrain from inciting or supporting acts of terrorism, subversion or sabotage in the countries of the area . . ."

539. It is clear from the context in which the 21 objectives were arrived at by the Contadora and Central American States that the achievement of those objectives was to be a co-operative undertaking on the part of all the governments concerned, working together to develop a regional framework for peace and economic development. This basic understanding is underscored by the final paragraph of the Document of Objectives:

> "The Ministers for Foreign Affairs of the Central American countries, with the participation of the countries in the Contadora Group, have begun negotiations with the aim of preparing for the conclusion of the agreements and the establishment of the machinery necessary to formalize and develop the objectives contained in this document, and to bring about the establishment of appropriate verification and monitoring systems."

This understanding was shared by the General Assembly of the United Nations, as reflected in its resolution 38/10 of 11 November 1983, which in pertinent part provides as follows:

> "*[The General Assembly,]*
>
> ***Bearing in mind*** . . . the endorsement by States of Central America of a Document of Objectives, which provides a basis for an agreement on the negotiations, that should be initiated at the earliest possible date with the aim of drawing up agreements and adopting the necessary procedures for formalizing the commitment and ensuring appropriate systems of control and verification,
>
> . . . .

> 7. *Welcomes with satisfaction* . . . the Document of Objectives endorsed by the Governments of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua, which contains the basis for the start of negotiations to ensure harmonious coexistence in Central America[.]"

It would be incompatible with the purpose and spirit of the 21 objectives for a party thereto to seek to invoke them in pursuit of its own aims in other fora, to the deliberate detriment of the other States party to the agreed objectives. This is precisely what Nicaragua is seeking to accomplish by urging its claims upon the Court.

540. It is in the latter connection that Nicaragua's assertion in its Memorial that, *inter alia*, the United Nations General Assembly resolution 38/10 of 11 November 1983 and Security Council resolution 530 (1983) establish Nicaragua as the "object of special concern" notwithstanding the Contadora process (para. 221), can be seen in its true light. Both resolutions were responses to Nicaraguan efforts, consistent with Nicaraguan tactical preferences, to have issues of particular concern to it, and to it alone, severed from the regional negotiating process. Contrary to the impression sought to be conveyed by Nicaragua, other participants in the Contadora process objected to Nicaragua's tactics. In October 1983 the Foreign Minister of Panama stated in an interview that:

> "Panama and the Contadora Group are concerned about Nicaragua's inclusion of the Central American situation in United Nations debates, since this could weaken the authority of the Venezuelan, Mexican, Colombian and Panamanian effort[1]."

541. Notwithstanding that the resolutions adopted by both the Security Council and the General Assembly expressly recognize the Contadora process as the appropriate means of addressing and resolving these issues, Nicaragua now seeks to invoke the jurisdiction of this Court for the purpose.

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[1] The text of the interview is attached at Ann. 110. Similarly, the Permanent Representative of Honduras to the United Nations declared in the course of the General Assembly debate of 8 November 1983 that:

> "[T]hrough this debate Nicaragua is attempting to attain several ends. First, it wishes to escape from the future Contadora Group negotiations because of their global and regional character. Secondly, it wishes to obtain the support of countries outside the continent. Thirdly, it wishes to polarize the Central American issue through East-West confrontation. Fourthly, it wishes to strike a harsh blow at the Latin American process of negotiation. Fifthly, it wishes to obtain support for its recent proposal to conclude four treaties: one multilateral treaty among the five Central American countries, two bilateral treaties — between the United States and Nicaragua, on the one hand, and Honduras and Nicaragua, on the other — and a fifth treaty, to be called an agreement among the countries interested in helping to solve the crisis in El Salvador. The latter project is aimed only at protecting Nicaragua, guaranteeing it impunity for its acts of intervention; it does not provide even the very minimum guarantees for the other countries of the area — least of all for Honduras. Furthermore, the four treaties do not fulfill the Contadora agenda, nor do they deal with the 21 objectives recently approved by the five Central American countries.
>
> *By means of all those tactics, the Government of Nicaragua is trying to escape from the future negotiations within the Contadora Group, to obtain political support against alleged acts of aggression, and not to be censured for its own acts of aggression against the rest of the Central American countries.*" (Italics added. *GAOR*, 38th Sess., doc. A/38/PV.48, pp. 52-53.)

Section III. Nicaragua Is Required by the Charters of the United Nations and of the Organization of American States to Seek Regional Solutions to Problems concerning the Maintenance of Regional Peace and Security

542. Article 52 of the Charter of the United Nations provides in pertinent part as follows:

> "1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action . . .
>
> 2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council."

As has been shown, the Contadora process has been recognized by both the Security Council and the General Assembly of the United Nations as the appropriate regional mechanism for dealing with the security and related problems facing the countries of Central America. There can be no doubt therefore that the Contadora process constitutes a "regional arrangement" within the meaning of Article 52 (1) of the Charter, as it has been accepted as such by the organs specifically vested by the Charter with responsibility in connection with the maintenance of international peace and security, and by the Organization of American States.

543. Under Article 52 (2) of the Charter, Nicaragua is obliged to make every effort to achieve a solution to the security problems of Central America through the Contadora process. While Article 52 (2) specifically contemplates the exhaustion of such regional processes as a precondition to the reference of a dispute to the Security Council only, to assume that such disputes could therefore be referred to other modes of non-regional settlement notwithstanding the continuation of the regional process would require a narrow construction of that Article that would be hard to reconcile with its logic and purpose. That Article, rather, refers only to the Security Council because the Security Council is the only organ of the United Nations expressly charged by the Charter with the responsibility for the settlement of disputes threatening international peace and security. Any limitation imposed by the Charter on the reference of disputes to the Security Council must, *a fortiori*, apply with even greater force with respect to the Court, which has no specific responsibility under the Charter for dealing with such matters.

544. Nicaragua is under a functionally similar obligation under the Charter of the Organization of American States, Articles 20 and 21 of which provide as follows:

> "*Article 20*
>
> All international disputes that may arise between American States shall be submitted to the peaceful procedures set forth in this Charter, before being referred to the Security Council of the United Nations.
>
> *Article 21*
>
> The following are peaceful procedures: direct negotiation, good offices, mediation, investigation and conciliation, judicial settlement, arbitration,

and *those which the parties to the dispute may especially agree upon at any time*." (Italics added[1].)

545. The Contadora process, and in particular the 21 objectives agreed to by Nicaragua on 9 September 1983, fall precisely within the scope of these Articles in so far as Nicaragua's obligations to the other participants in the Contadora process are concerned.

546. The Nicaraguan Memorial observes correctly that the United States is not a formal participant in the Contadora process (para. 230). The United States is not a participant primarily because the Contadora process is the product of the desires of the concerned Latin American States to join in a Latin American effort to resolve the security and related problems besetting Central America as a whole. The United States has repeatedly enunciated its strong support for that regional effort and is of the view that that process, provided that all the participants therein co-operate in good faith, offers by far the best hope for the resolution of those regional problems. Moreover, the United States is currently engaged in ancillary bilateral discussions with Nicaragua in support of the Contadora process.

547. The Nicaraguan Memorial asserts that United States non-participation in the Contadora process somehow establishes that the alleged dispute that Nicaragua has requested this Court to adjudicate is not a matter that can be resolved by the Contadora process (paras. 230 *et seq.*). To the extent that there exists a dispute between Nicaragua and the United States, it is related directly to the questions being addressed in the framework established by the Contadora process. Indeed, the United States has solemnly declared that "full and verifiable implementation of the Contadora document of objectives would fully meet the goals of United States policy in Central America as well as the expressed security concerns of Nicaragua[2]".

Section IV. Adjudication of Only One Part of the Issues Involved in the Contadora Process Would Necessarily Disrupt that Process

548. Nicaragua is asking this Court to adjudicate only certain of the issues involved in the Contadora process: those issues of importance to it and on the basis of assertions that characterize those issues in a manner wholly favourable to Nicaragua. Such adjudication would have the inevitable effect of rendering those issues, about which Nicaragua has agreed to negotiate in the Contadora context, largely immune to further adjustment in the course of those negotiations. This would in turn necessarily disrupt the balance of the negotiating process, a balance that has been carefully and skilfully worked out by those countries working under the aegis of the Contadora Group and expressly approved by both the United Nations and the Organization of American States.

549. The situation thus presented by the instant case finds no precedent in the jurisprudence of the Court. Unlike the situation considered by the Court in the *Aegean Sea Continental Shelf* case, there is more at stake here than a mere inchoate possibility that judicial abstention would "create a more favorable political climate for an agreed settlement[3]". Under the Contadora process,

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[1] It may be noted that here, as in Article 33 (1) of the Charter of the United Nations, special means chosen by the parties are given equal status with judicial settlement.

[2] Shultz Affidavit, Ann. 1, para. 11.

[3] *Aegean Sea Continental Shelf*, *op. cit.*, at p. 12 (Turkish note verbale).

matters have progressed to a far more developed stage, where all the Central American parties, including Nicaragua, have "agreed to agree" with respect to achieving, through negotiations, a settlement of, *inter alia*, the very issues that Nicaragua now seeks to have adjudicated, outside of that regional process, in this Court[1].

550. The parties are now in the process of considering a draft agreement to that very end. The Nicaraguan Application is not merely different from the approach settled upon in the Contadora context by Nicaragua and its neighboring countries; it is incompatible with it.

551. Given the commitment of both Nicaragua and the United States to the Contadora process, the endorsement of that process by the competent political organs of the United Nations and the Organization of American States, and the comprehensive, integrated nature of that process itself, the Court should refrain from adjudicating the merits of the Nicaraguan allegations and hold the Nicaraguan Application of 9 April to be inadmissible.

SUBMISSIONS

May it please the Court, on behalf of the United States of America, to adjudge and declare, for each and all of the foregoing reasons, that the claims set forth in Nicaragua's Application of 9 April 1984 (1) are not within the jurisdiction of this Court and (2) are inadmissible.

17 August 1984.

(Signed) Davis R. ROBINSON,
Agent of the United States
of America.

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[1] This identity of issues is, of course, the primary factor that fundamentally differentiates this case from those before this Court in *United States Diplomatic and Consular Staff, op. cit.*, and before the Permanent Court of International Justice in *Memel* and *Minority Schools, op. cit.*

ANNEXES TO THE COUNTER-MEMORIAL OF THE UNITED STATES OF AMERICA

Annex 1

AFFIDAVIT OF SECRETARY OF STATE GEORGE P. SHULTZ, DATED 14 AUGUST 1984

1. I, George P. Shultz, hereby declare and state as follows: I am Secretary of State of the United States of America. I have held this office since July 16, 1982. As Secretary of State, I am responsible, pursuant to the guidance of the President of the United States, for the formulation and execution of the foreign policy of the United States.

2. As Secretary of State and as a member of the National Security Council, I have access to the entire range of diplomatic and intelligence information available to the Government of the United States.

3. The information available to the Government of the United States through diplomatic channels and intelligence means, and in many instances confirmed by publicly available information, establishes that the Government of Nicaragua has, since shortly after its assumption of power in 1979, engaged in a consistent pattern of armed aggression against its neighbors. Other responsible officials of the United States Government, including the President and the responsible Committees of the United States Congress having access to such information, share this view. In addition, responsible officials of other States in the region have reached a similar conclusion based on their own sources of information.

4. The United States has abundant evidence that the Government of Nicaragua has actively supported armed groups engaged in military and paramilitary activities in and against El Salvador, providing such groups with sites in Nicaragua for communications facilities, command and control headquarters, training and logistics support. The Government of Nicaragua is directly engaged with these armed groups in planning on-going military and paramilitary activities conducted in and against El Salvador. The Government of Nicaragua also participates directly in the procurement, and transshipment through Nicaraguan territory, of large quantities of ammunition, supplies and weapons for the armed groups conducting military and paramilitary activities in and against El Salvador.

5. In addition to this support for armed groups operating in and against El Salvador, the Government of Nicaragua has engaged in similar support, albeit on a smaller scale, for armed groups engaged, or which have sought to engage, in military or paramilitary activities in and against the Republic of Costa Rica, the Republic of Honduras, and the Republic of Guatemala. The regular military forces of Nicaragua have engaged in several direct attacks on Honduran and Costa Rican territory, causing casualties among the armed forces and civilian populations of those States.

6. I am aware of the allegation made by the Republic of Nicaragua in its Application to the International Court of Justice dated April 9, 1984, that the United States is engaged in an unlawful armed attack against Nicaragua, conducted by means of "mercenary" forces employed and directed by the United States, which has as its objective the overthrow of the Government of Nicaragua.

I am further aware that the Government of Nicaragua has sought to characterize the current dispute between the Republic of Nicaragua and the United States as exclusively the product of United States opposition towards the domestic and foreign political orientation of the Government of Nicaragua.

7. I hereby affirm that the United States recognizes and respects the prohibitions concerning the threat or use of force set forth in the Charter of the United Nations, and that the United States considers its policies and activities in Central America, and with respect to Nicaragua in particular, to be in full accord with the provisions of the Charter of the United Nations. Pursuant to the inherent right of collective self-defense, and in accord with its obligations under the Inter-American Treaty of Reciprocal Assistance, the United States has provided support for military activities against forces directed or supported by Nicaragua as a necessary and proportionate means of resisting and deterring Nicaraguan military and paramilitary acts against its neighbors, pending a peaceful settlement of the conflict. I further affirm that the overthrow of the Government of Nicaragua is not the object nor the purpose of United States policy in the region. Our position in this respect is clear and public. As President Reagan stated in a published letter to Senator Baker of April 4, 1984:

> "The United States does not seek to destabilize or overthrow the Government of Nicaragua; nor to impose or compel any particular form of government there.
>
> We are trying, among other things, to bring the Sandinistas into meaningful negotiations and constructive, verifiable agreements with their neighbors on peace in the region.
>
> We believe that a pre-condition to any successful negotiations in these regards is that the Government of Nicaragua cease to involve itself in the internal or external affairs of its neighbors, as required of member nations of the OAS."

8. I am aware of the diplomatic efforts made by the Central American States, other hemispheric nations including particularly the "Contadora Group" of Colombia, Panama, Mexico and Venezuela, the United Nations Security Council, the Organization of American States, and the United States over the past five years to resolve the conflict in Central America. In this regard, I have personally engaged in a dialogue with the Nicaraguan leadership, as well as with the leaders of the other nations in the region. There has been widespread recognition that, despite Nicaragua's efforts to portray the conflict as a bilateral issue between itself and the United States, the scope of the conflict is far broader, involving not only cross-border attacks and State support for armed groups within various nations of the region, but also indigenous armed opposition groups within countries of the region. It has been further recognized that under these circumstances, efforts to stop the fighting in the region would likely be fruitless and ineffective absent measures to address the legitimate economic, social and political grievances of the peoples of the region which have given rise to such indigenous armed opposition.

9. In this regard, States in the region, including the Contadora Group, the United States, the leadership of the Catholic Church in both El Salvador and Nicaragua, and others have called for a dialogue between the respective governments and their armed opponents aimed at achieving internal reconciliation. The Government of El Salvador has called for a dialogue with the armed groups in that country and has offered them the opportunity to lay down their arms and participate in free elections. The United States has supported and facilitated these efforts at reconciliation, including meetings between United States represen-

tatives and members of the Salvadoran opposition. The armed opposition within Nicaragua is a manifestation of dissatisfaction with the failure of the Government of Nicaragua to carry out the commitment to broadly representative democratic government that it made to the Organization of American States and the Nicaraguan people prior to its assumption of power. The armed opposition groups in Nicaragua have offered to lay down their arms if given an opportunity to participate in free and fair elections. The Government of Nicaragua has thus far refused this offer, and has condemned, *inter alia*, the leadership of the Catholic Church for suggesting a dialogue. The leaders of the armed opposition in Nicaragua were allies of the members of the current government during the Nicaragua revolution and many were senior officials of the current government prior to going into opposition. It is my judgment that these groups would continue their acts of opposition against the Government of Nicaragua, regardless of any arrangements made between Nicaragua and other States that failed to address their legitimate grievances.

10. The need for internal reconciliation as well as inter-State arrangements is reflected in the defined objectives of the dispute settlement process established under the auspices of the Contadora Group and endorsed by the United Nations Security Council, the Organization of American States and the United States. These objectives — agreed upon by each of the Central American States, including Nicaragua — include political, economic and social reforms designed to deal with the indigenous causes of conflict, as well as a cessation of hostilities, address of cross-border security problems, the establishment of arms limitations, and the creation of effective verification mechanisms. These agreed objectives have been incorporated by the Contadora Group into a detailed text of a proposed comprehensive negotiating document, which is now under discussion by the Parties.

11. The United States fully supports the objectives already agreed upon in the Contadora process as a basis for a solution of the conflict in Central America. The objectives of United States policy towards Nicaragua are entirely consistent with those broader agreed objectives and full and verifiable implementation of the Contadora document of objectives would fully meet the goals of United States policy in Central America as well as the expressed security concerns of Nicaragua.

12. On June 1, 1984, I personally travelled to Managua, Nicaragua, to initiate a dialogue directly with Nicaraguan leaders designed to facilitate the achievement of the Contadora objectives. On the basis of my meeting with leaders of the Government of Nicaragua, senior representatives of the United States and Nicaragua have subsequently met on several occasions. While the substance of these diplomatic discussions is being kept confidential by both sides, Nicaragua is fully aware of the seriousness of the United States commitment to the achievement of a comprehensive solution on the basis of the agreed Contadora objectives. Nicaragua has sought publicly to portray as intervention in its internal affairs United States expressions of support *(a)* for an end to Nicaraguan armed acts against its neighbors, *(b)* for political pluralism in Nicaragua, *(c)* for reductions in the massive arms inventory of that nation, and *(d)* for the removal of foreign advisers from its territory. These charges are belied by the fact that *(a)* the termination of all support for armed insurgencies in the region, *(b)* the development of democratic and pluralistic political institutions in each of the countries, *(c)* arms reductions to achieve regional balance, and *(d)* the elimination of foreign military advisers throughout the region are objectives expressly agreed to by Nicaragua in the Contadora process.

13. As indicated above, the United States recognizes the applicability to the

conflict in Central America of international law relative to the use of force, and considers its own policies and activities to be fully consonant with its international obligations. The United States considers, however, that in the current circumstances involving on-going hostilities, adjudication is inappropriate and would be extremely prejudicial to the existing dispute settlement process. Achieving agreement on both the nature of the dispute and the scope of the issues to be addressed in a settlement was a major accomplishment of the Contadora Group, fully supported by the appropriate international organs. To permit one party to create a parallel dispute settlement process dealing with only one aspect of the dispute and of the issues required to be addressed in a comprehensive solution would affect adversely the current multilateral and bilateral negotiating processes encompassed in the Contadora framework, and could, in the opinion of the United States, delay, if not forestall, an end to the fighting.

(Signed) George P. SHULTZ.

Signed and sworn before me this 14th day of August, 1984.

(Signed) [Illegible.]
(Notary)

Annex 2

AFFIDAVIT OF STEPHEN R. BOND, COUNSELOR FOR LEGAL AFFAIRS WITH THE UNITED STATES MISSION TO THE UNITED NATIONS IN GENEVA, CONCERNING FILE ENTITLED "LEAGUE OF NATIONS ARCHIVES, 1928 TO 1932, STATUTE OF THE COURT, SIGNATURE AND RATIFICATION BY THE GOVERNMENT OF NICARAGUA", REGISTRY NUMBER 3C/12843/279, DATED 31 JULY 1984

[Not reproduced]

Annex 3

LETTER FROM THE DIVISION OF FOREIGN AFFAIRS, FEDERAL POLITICAL DEPARTMENT, GOVERNMENT OF SWITZERLAND, TO THE SECRETARY-GENERAL OF THE LEAGUE OF NATIONS, DATED 22 OCTOBER 1929 (LEAGUE OF NATIONS ARCHIVES, FILE NUMBER 3C/12843/279)

B 56/6/4 - UE

Monsieur le Secrétaire général,

Vous avez bien voulu, par vos lettres des 8, 11 et 12 octobre, porter à notre connaissance que l'Australie, le Canada, l'Inde et le Nicaragua ont signé le protocole de signature concernant la disposition facultative prévue à l'article 36 du Statut de la Cour permanente de Justice internationale et que le Pérou et le Nicaragua ont signé, de leur côté, le protocole, du 16 décembre 1929, concernant le Statut de la Cour.

Tout en vous remerciant vivement de cette obligeante communication, nous vous serions reconnaissants de consentir à nous faire savoir si les signatures données par le Nicaragua et le Pérou sont sujettes à ratification.

Veuillez agréer, Monsieur le Secrétaire général, l'assurance de notre haute considération.

(Signé) [Illisible.]

Annex 4

LETTER FROM THE LEAGUE OF NATIONS LEGAL ADVISER TO THE CHIEF OF THE FEDERAL POLITICAL DEPARTMENT, DIVISION OF FOREIGN AFFAIRS, GOVERNMENT OF SWITZERLAND, DATED 25 OCTOBER 1929 (LEAGUE OF NATIONS ARCHIVES, FILE NUMBER 3C/12843/279)

Monsieur le Conseiller fédéral,

En réponse à votre lettre du 22 de ce mois, n° B 56/6/4-UE, j'ai l'honneur de porter à votre connaissance que le protocole de signature du Statut de la Cour permanente de Justice internationale, en date du 16 décembre 1920 étant sujet à ratification, ainsi qu'il est prévu aux termes mêmes du protocole, les signatures apposées par le Nicaragua et par le Pérou ne produiront leurs effets qu'à partir de la date du dépôt des instruments de ratification au Secrétariat. Je ne manquerai pas de vous informer de ce dépôt aussitôt qu'il aura eu lieu.

Je saisis cette occasion pour vous renouveler, Monsieur le Conseiller fédéral, les assurances de ma haute considération.

Pour le Secrétaire général,
le conseiller juridique du Secrétariat,
(Signé) J. A. BUERO.

Annex 5

LETTER FROM THE DEPARTMENT OF FOREIGN AFFAIRS OF THE REPUBLIC OF AUSTRIA TO THE SECRETARY-GENERAL OF THE LEAGUE OF NATIONS, DATED 29 OCTOBER 1929 (LEAGUE OF NATIONS ARCHIVES, FILE NUMBER 3C/12843/279)

N° 26.391 - 15/1929.

Monsieur le Secrétaire général,

Me référant à votre note en date du 12 de ce mois, n° C.L. 246.1929.V, j'ai l'honneur de vous prier de vouloir bien me faire savoir si l'adhésion du Nicaragua au protocole concernant le Statut de la Cour permanente est définitive ou si elle ne produira ses effets qu'après la ratification de la signature par ledit Etat.

Veuillez agréer, Monsieur le Secrétaire général, l'assurance de ma haute considération.

(Signé) [Illisible.]

Annex 6

LETTER FROM THE LEAGUE OF NATIONS LEGAL ADVISER TO THE CHANCELLOR, MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF AUSTRIA, DATED 7 NOVEMBER 1929 (LEAGUE OF NATIONS ARCHIVES, FILE NUMBER 3D/12843/279)

Monsieur le Chancelier fédéral,

J'ai l'honneur de vous accuser réception de la lettre du 29 octobre dernier, n° 26.391-15/1929, par laquelle vous avez bien voulu me demander, vous référant à ma note du 12 octobre 1929, C.L.246.1929.V, si l'adhésion du Nicaragua au protocole de signature du Statut de la Cour permanente de Justice internationale est définitive ou si elle ne produira ses effets qu'après la ratification de la signature par ledit Etat.

En réponse je m'empresse de porter à votre connaissance que la signature par le Nicaragua du protocole susmentionné est soumise à la ratification, ainsi qu'il est prévu au troisième paragraphe de ce protocole.

Veuillez agréer, Monsieur le Chancelier fédéral, les assurances de ma haute considération.

Pour le Secrétaire général,
le conseiller juridique du Secrétariat,
(Signé) [Illisible.]

Annex 7

LETTER FROM T. F. MEDINA, NICARAGUAN DELEGATE TO THE LEAGUE OF NATIONS, TO THE SECRETARY-GENERAL OF THE LEAGUE OF NATIONS, DATED 29 NOVEMBER 1930 (LEAGUE OF NATIONS ARCHIVES, FILE NUMBER 3C/12843/279)[1] AND FRENCH TRANSLATION

9, rue Louis David
Paris XVI.

Le 29 novembre 1930.

Monsieur le Secrétaire général,

Je suis heureux de porter à votre connaissance que je viens de recevoir une note du ministre des affaires étrangères de Nicaragua m'informant qu'il soumettra à l'approbation du Congrès national, lors de ses prochaines sessions ordinaires qui commenceront le 15 décembre prochain, le protocole relatif au Statut de la Cour permanente de Justice internationale et la disposition facultative prévue dans le protocole.

Le ministre des affaires étrangères m'autorise à déclarer au Secrétaire général qu'en attendant la résolution du Congrès, il ne voit aucun inconvénient à ce que les réformes apportées au Statut de la Cour, résultant du protocole en question, entrent en vigueur dès avant la ratification de tous les gouvernements qui l'ont souscrit.

Veuillez agréer, etc.

(Signé) T. F. MEDINA.

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[1] Not reproduced.

Annex 8

XXXIX *La Gaceta* 386-387 (1935) (Referral of the Protocol of Signature to the Nicaraguan Congress)[1] and English Translation

Source: *La Gaceta*, Managua, No. 49, February 27, 1935]

6. The notes were read by which the Minister of Foreign Relations transmitted the following treaties, signed at the Seventh International Conference of American States at Montevideo, which have already been approved by the Executive Power and are to be ratified by the Legislative Power:

Conventions signed at the Seventh International Conference of American States at Montevideo.

Statute and Protocol of the Permanent Court of International Justice.

Convention to facilitate the international circulation of films of an educational nature.

Convention incorporating the proposal by the United States delegation, ncluded in the 81st Resolution of the Seventh International Conference of American States concerning the commitment to refrain from invoking the obligations of the most-favored-nation clause in order to obtain the advantages and benefits enjoyed by the parties to multilateral economic conventions of general applicability.

Treaty on the protection of movable property of historical value.

After being considered they were sent to committee.

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[1] Not reproduced.

Annex 9

XXXIX *La Gaceta* 1033 (1935) (Nicaragua's Senate Approves the Protocol of Signature)[1] and English Translation

[Source: *La Gaceta*, Managua, No. 130, June 12, 1935]

3. The decree ratifying the Statute of the Permanent Court of International Justice was read, together with its Protocol of Signature, the amendments to said Statute, and their Protocol of Signature. Also ratified was the Protocol of Accession of the United States of America to the Protocol of Signature of the aforesaid Statute.

On the motion of Senator Sandoval, the second reading of this decree was waived.

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[1] Not reproduced.

Annex 10

XXXIX *La Gaceta* 1673 (1935) (Nicaragua's Chamber of Deputies Approves the Protocol of Signature)[1] and English Translation

Source: *La Gaceta*, Managua, No. 207, September 18, 1935]

122 — A Senate proposal to ratify the Statute of the Permanent Court of nternational Justice of The Hague and its Protocol of Signature, signed at Geneva on December 13 and 16, 1920, were read and approved, with a waiver of the second reading, together with the amendments to said Statute and their Protocol of Signature, and the Protocol signed at Geneva on September 14, 1929, concerning the accession of the United States of America to the Protocol of Signature of the aforesaid Statute, [all] approved by the Executive Power on December 4, 1934.

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[1] Not reproduced.

Annex 11

LETTER FROM THE MINISTER OF FOREIGN AFFAIRS OF NICARAGUA TO THE SECRETARY-GENERAL OF THE LEAGUE OF NATIONS, DATED 4 APRIL 1935[1] AND ENGLISH TRANSLATION

Department of State, Division of Language Services

(Translation)

LS No. 113613-A
LM/BP
Spanish.

Ministry of Foreign Affairs of the Republic of Nicaragua

[Stamp: Received League of Nations Registry April 23, 1935]

Managua, D.N., April 4, 1935.

No. 3A/15353/1000

Mr. Secretary:

I have the honor to refer to your note No. C.L. 34.1935. V. of March 5, 1935, in which you reproduce the resolution adopted by the Assembly of the League of Nations on October 3, 1930, regarding the assignment given to the Secretariat to obtain from the member and non-member States of the League of Nations timely information concerning their intentions with respect to the ratification of any conventions concluded under the auspices of the League of Nations that have been signed but not ratified one year after the closing of the Protocol of Signature.

I am pleased to provide you with the following information regarding the Republic of Nicaragua:

The President of Nicaragua issued a decree on February 15, 1932, acceding to the Convention, signed at Geneva on March 19, 1931, providing a uniform law for cheques and the corresponding Protocol, the Convention for the settlement of certain conflicts of laws in connection with cheques and the corresponding Protocol, and the Convention on the stamp laws in connection with cheques and the corresponding Protocol. All these instruments have been submitted to the National Congress for its consideration but they have not yet been approved.

The President also acceded, by a decree dated May 16, 1932, to the General Convention to improve the means of preventing war signed at Geneva on September 26, 1931. That Convention was approved by the National Congress in a decree dated February 19, 1935, which was sanctioned by the Executive

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[1] Not reproduced.

Power on February 22, 1935. The instrument of ratification was sent by this Ministry to the League Secretariat on March 2, 1935.

The [International] Convention for [the suppression of] the traffic in women and children of September 30, 1921, and the [International] Convention for the suppression of the traffic in women of full age, of October 11, 1933, as well as the Conventions for suppression of the white slave traffic, signed in Paris on May 18, 1904, and on May 4, 1910, have just been ratified simultaneously by the Congress of Nicaragua in the Legislative Decree of February 26, 1935, which was sanctioned by the Executive Power on March 1, 1935. Within a few days the respective instrument of ratification will be sent.

The Convention, signed at Geneva on October 11, 1933, under the auspices of the League of Nations, to facilitate the international circulation of movies of an educational nature has also been ratified by the National Congress by the Decree of February 19, 1935, which was sanctioned by the Executive Power on February 22, 1935. As soon as it is promulgated in *La Gaceta Official* [Official Gazette], the instrument of ratification will be sent to the League Secretariat.

Finally, the Statute of the Permanent Court of International Justice, of December 13, 1920, and its Protocol of Signature, of December 16, 1920, as well as amendments to the Statute which are annexed to the Protocol signed at Geneva on September 14, 1929, and the other protocol whose purpose was to obtain the accession of the United States of America to the Statute of the Court have all been signed by Nicaragua and have been submitted to the Congress of the Republic for its constitutional ratification. As soon as that formality is completed, I shall have the pleasure of sending the appropriate instruments of ratification to the League of Nations Secretariat.

I remain, Mr. Secretary, with all consideration,

Very truly yours,

(Signed) Leonard ARGÜELLO,
Minister of Foreign Affairs.

Annex 12

LETTER FROM THE LEGAL ADVISER OF THE LEAGUE OF NATIONS TO THE MINISTER OF FOREIGN AFFAIRS OF NICARAGUA, DATED 6 MAY 1935 (LEAGUE OF NATIONS ARCHIVES, FILE NUMBER 3C/17664/1589)

[See I, *Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, pp. 258-260]*

Annex 13

LETTER FROM THE UNITED STATES AMBASSADOR TO NICARAGUA TO THE SECRETARY OF STATE, DATED 13 MAY 1943, ENCLOSING A LETTER FROM THE AMBASSADOR TO JUDGE MANLEY HUDSON, DATED 13 MAY 1943, AND AN UNSIGNED COPY OF THE DECREE OF 11 JULY 1935[1] AND ENGLISH TRANSLATION

[For the letters see **I**, *Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, p. 262]*

ENGLISH TRANSLATION OF UNSIGNED COPY OF THE DECREE OF 11 JULY 1935

Department of State, Division of Language Services

(Translation)

LS No. 113576
ALK/BP
Spanish.

Copy

Senate of Nicaragua

The President of the Republic
to the people of Nicaragua
Be it known that:

The Senate and Chamber of Deputies of the Republic of Nicaragua Decree:

Article 1: The Statute of the Permanent Court of International Justice of The Hague and the Protocol of Signature of said Statute, signed at Geneva on December 13 and 16, 1920, are hereby ratified, together with the amendments to said Statute and the Protocol of Signature of these amendments, and the Protocol signed at Geneva on September 14, 1929, concerning the accession of the United States of America to the Protocol of Signature of the aforesaid Statute, all approved by the Executive Power in a decree dated December 4, 1934.

Article 2: This law shall enter into force upon publication in *La Gaceta* [Official Gazette].

Done in the Senate Chamber, at Managua, D.N., on February 14, 1935.

José D. ESTRADA,
President of the Senate.

Leonidas S. MENA,
Clerk of the Senate.

Alberto GOMÉS,
Clerk of the Senate.

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[1] Not reproduced.

To: the Executive Power [from the] Chamber of Deputies, Managua, D.N., July 11, 1935

S. RIZO G.,
(Seal of the Chamber of Deputies)

J. Ant. BONILLA,
Clerk of the Chamber of Deputies.

J. N. SANDINO,
Clerk of the Chamber of Deputies.

(Seal of the Chamber of Deputies)

Therefore: This shall be executed

Presidential Palace,
Managua, D.N., July 13, 1935

Juan B. SACASA,
Minister of Foreign Relations.

Leonardo ARGÜELLO.

(Great Seal of the Nation)

(Seal of the Ministry of Foreign Relations)

Annex 14

TELEGRAM FROM MANAGUA TO SECRETARY, LEAGUE OF NATIONS, DATED 30 NOVEMBER 1939[1] AND ENGLISH TRANSLATION

LS No. 113613-B

(Telegram)

19781 Managua Nic CL340 22 29 1710 via CIAL RS

No. 2959 3C/17664/1589

Secretary, League of Nations, Geneva.

Statute and Protocol of Permanent Court of International Justice, The Hague, already ratified. Instrument of Ratification to be sent in due time. Ministry of Foreign Affairs.

[Stamp: Received November 30, 1939]

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[1] Not reproduced.

Annex 15

Affidavit of Stephen R. Bond, Counselor for Legal Affairs with the United States Mission to the United Nations in Geneva concerning File Entitled "League of Nations Archives, 1933-1940, Protocole et Statut tablissant la Cour permanente de Justice internationale, signé à Genève 16 décembre 1920, signatures et ratifications, Turquie", Registry Number 3C/19181/1589, Dated 31 July 1984

[Not reproduced]

Annex 16

Letter from the Minister of Foreign Affairs of the Republic of Turkey to the Secretary-General of the League of Nations, Dated 16 July 1935 (League of Nations Archives, File Number 3C/19181/1589)

14661/64

Monsieur le Secrétaire général,

J'ai l'honneur de vous faire savoir que la grande Assemblée nationale a, par une loi en date du 12 juin 1935, *sub* n° 2774, ratifié l'adhésion sans réserves de la Turquie aux protocoles suivants :

1) protocole de signature concernant le Statut de la Cour permanente de Justice internationale (Genève, le 16 décembre 1920),
2) protocole concernant la revision du Statut de la Cour permanente de Justice internationale (Genève, le 14 septembre 1929),
3) protocole concernant l'adhésion des Etats-Unis d'Amérique au protocole de signature du Statut de la Cour permanente de Justice internationale (Genève, le 14 septembre 1929).

En ce qui concerne l'adhésion à la disposition facultative prévue à l'article 36 du Statut de la Cour, celle-ci se trouve être subordonnée par la même loi aux réserves suivantes :

1. L'adhésion de la Turquie comportera la condition de la réciprocité.
2. Elle sera valable pour une période de cinq ans.
3. La juridiction obligatoire de la Cour ne sera applicable qu'aux différends ainsi qu'aux faits qui en sont la cause, postérieurs à la date de l'adhésion.
4. L'adhésion impliquera pour la Turquie la reconnaissance de la compétence obligatoire de la Cour permanente de Justice internationale pour les différends énumérés à l'article 36 du Statut de la Cour sauf les différends se rapportant soit directement soit indirectement à l'application des traités et des conventions que la Turquie a conclus et pour lesquels une autre procédure de solution est prévue.

En portant ce qui précède à votre connaissance j'ai l'honneur d'ajouter que je ne manquerai pas de vous transmettre sous peu l'instrument d'adhésion des protocoles susvisés.

Veuillez agréer, Monsieur le Secrétaire général, les assurances de ma haute considération.

Pour le ministre,
le secrétaire général,
(Signé) [Illisible.]

Annex 17

Letter from the Acting Legal Adviser of the League of Nations to the inister of Foreign Affairs of the Republic of Turkey, Dated 29 July 1935 (League of Nations Archives, File Number 3C/19181/1589)

Monsieur le Ministre,

J'ai l'honneur d'accuser réception de la lettre du 16 juillet 1935, n° 14661/64, r laquelle vous avez bien voulu me faire savoir que le Gouvernement de la épublique turque a décidé de devenir partie aux protocoles suivants :

- protocole de signature du Statut de la Cour permanente de Justice internationale (Genève, le 16 décembre 1920) ;
- protocole concernant la revision du Statut de la Cour permanente de Justice internationale (Genève, le 14 septembre 1929) ;
- protocole concernant l'adhésion des Etats-Unis d'Amérique au protocole de signature du Statut de la Cour permanente de Justice internationale (Genève, le 14 septembre 1929).

De plus, vous voulez bien m'informer que la Turquie a décidé d'adhérer à la isposition facultative prévue à l'article 36 du Statut de la Cour en faisant la éclaration suivante :

> « L'adhésion de la Turquie comportera la condition de réciprocité.
>
> Elle sera valable pour une période de cinq ans.
>
> La juridiction obligatoire de la Cour ne sera applicable qu'aux différends ainsi qu'aux faits qui en sont la cause, postérieurs à la date de l'adhésion.
>
> L'adhésion impliquera, pour la Turquie, la reconnaissance de la compétence obligatoire de la Cour permanente de Justice internationale pour les différends énumérés à l'article 36 du Statut de la Cour, sauf les différends se rapportant soit directement, soit indirectement à l'application des traités et des conventions que la Turquie a conclus et pour lesquels une autre procédure de solution est prévue. »

Vous avez bien voulu ajouter que vous comptez me transmettre prochainement 'instrument d'adhésion de la Turquie aux protocoles susmentionnés.

En vous remerciant de cette communication, je dois attirer votre attention sur e point suivant :

Les trois protocoles en question, à la différence de la plupart des conventions générales, ne prévoient pas l'adhésion comme moyen pour les Etats d'y devenir partie. La seule procédure prévue — procédure qui a été jusqu'ici suivie par tous es Etats qui sont devenus parties à ces protocoles — est celle d'une signature suivie d'une ratification. Dès lors, pour devenir partie à ces protocoles, le Gouvernement turc devra désigner un plénipotentiaire pour les signer à Genève. Cette signature devra être ratifiée. L'instrument de ratification de la signature peut, du reste, être déposé au Secrétariat en même temps que la signature est donnée.

En ce qui concerne la disposition facultative de l'article 36, paragraphe 2, du Statut de la Cour, la déclaration d'acceptation de la juridiction de la Cour doit être inscrite sur le texte authentique du protocole de 1920, à la suite des autres déclarations similaires et cette déclaration doit être suivie de la signature du plénipotentiaire. Cette déclaration peut, selon le gré des gouvernements, contenir ou non une réserve de ratification. Si une telle réserve n'existe pas dans la déclaration, celle-ci sort immédiatement ses effets. Il n'est donc pas nécessaire, si la Turquie entend se lier immédiatement, qu'elle fasse une réserve de ratification et qu'elle dépose un instrument de ratification *en ce qui concerne l'article 36.*

Je m'empresse d'ajouter que le Secrétariat se tient à l'entière disposition de votre gouvernement pour faciliter l'accomplissement de ces formalités.

Veuillez agréer, Monsieur le Ministre, les assurances de ma haute considération.

Pour le Secrétaire général,
Le conseiller juridique p.i. du Secrétariat,
(Signé) H. McKINNON WOOD.

Annex 18

LETTER FROM M. HAMMARSKJÖLD, REGISTRAR OF THE PERMANENT COURT TO THE LEGAL ADVISER OF THE LEAGUE OF NATIONS, DATED 18 MARCH 1936 (LEAGUE OF NATIONS ARCHIVES, FILE NUMBER 3C/19181/1589)

I/12433.

Mon cher Nisot,

Par ce même courrier, j'accuse réception de la lettre en date du 13 mars 1936, signée par vous, par laquelle nous est notifiée la signature au nom de la Turquie du protocole de signature du Statut de 1920, du protocole d'adhésion des Etats-Unis, ainsi que de la disposition facultative.

Il résulte de cette lettre que la Turquie n'a pas signé le protocole de revision de 1929. La cause en est sans doute que le protocole de 1929, dans son paragraphe 6, stipule que, dès son entrée en vigueur, toute acceptation du Statut signifiera acceptation du Statut revisé.

D'autre part, avant de considérer la Turquie comme liée par les instruments qu'elle a signés, nous attendrons évidemment des nouvelles de Genève quant à a question de sa ratification.

Je vous prie de croire, mon cher Nisot, à mes sentiments les meilleurs,

(Signé) HAMMARSKJÖLD.

Annex 19

LETTER FROM THE NORWEGIAN DELEGATE TO THE LEAGUE OF NATIONS TO THE LEGAL ADVISER OF THE LEAGUE OF NATIONS, DATED 15 APRIL 1936 (LEAGUE OF NATIONS ARCHIVES, FILE NUMBER 3C/19181/1589)

Monsieur le Conseiller juridique,

Me référant à la lettre circulaire du 25 mars dernier (C.L.58.1936.V) au sujet de la signature par le délégué permanent de la Turquie auprès de la Société des Nations du protocole de signature concernant le Statut de la Cour permanente de Justice internationale, je serais reconnaissant d'être informé si ladite signature est définitive ou si une ratification est prévue.

Veuillez agréer, Monsieur le Conseiller juridique, l'assurance de ma considération la plus distinguée.

Le délégué permanent de la Norvège,
(Signé) [Illisible.]

Annex 20

LETTER FROM THE LEGAL ADVISER OF THE LEAGUE OF NATIONS TO THE NORWEGIAN DELEGATE TO THE LEAGUE OF NATIONS, DATED 21 APRIL 1936 (LEAGUE OF NATIONS ARCHIVES, FILE NUMBER 3C/19181/1589)

Monsieur le Délégué,

En réponse à votre lettre du 15 avril 1936, je m'empresse de vous faire savoir que, conformément aux dispositions du protocole de signature du Statut de la Cour permanente de Justice internationale, la signature de cet acte par la Turquie st soumise à ratification.

La déclaration signée par la Turquie, acceptant la juridiction obligatoire de la Cour, telle qu'elle est prévue au paragraphe 36 du Statut, ne prévoit pas 'obligation de ratification, mais il reste entendu qu'elle ne produira ses effets qu'après la ratification par la Turquie du protocole de signature du Statut de la Cour permanente de Justice internationale.

Veuillez agréer, Monsieur le Délégué, les assurances de ma haute considération.

Pour le Secrétaire général,
Le conseiller juridique du Secrétariat,
(Signé) L. A. PODESTA COSTA.

Annex 21

LETTER FROM THE FOREIGN OFFICE OF THE UNITED KINGDOM TO H. MCKINNON WOOD OF THE LEGAL SECTION OF THE LEAGUE OF NATIONS SECRETARIAT, DATED 8 JULY 1937 (LEAGUE OF NATIONS ARCHIVES, FILE NUMBER 3C/19181/1589)

(E 3311/1027/44)

Dear Hugh,

In letter No. C.L. 58. 1936. V. dated 25th March 1936 signed by Nisot, we were informed that Turkey had signed the protocol of signature concerning the Statute of the Permanent Court of International Justice, the protocol relating to the accession of the United States of America etc. and the optional clause. We want to know whether this signature became effective at once or whether it was subject to ratification. Nothing was said about ratification in Nisot's letter and therefore we were disposed to conclude that the signature became effective immediately. The only doubt arises from the terms of the protocol of signature of the Statute of the Permanent Court of International Justice itself. If you read the protocol it is clear that the original signatures of the protocol were certainly subject to ratification. The last paragraph but two, however, which deals with the subsequent signatures is silent on this point. Are we to conclude therefore that a subsequent signature under this latter paragraph is effective at once unless it is stated to be subject to ratification?

It is clear that a signature of the optional clause comes into force at once unless it is expressly made subject to ratification but a signature under the optional clause cannot become effective until the signature of the protocol itself becomes effective. Have you had any other signatures under the last paragraph but two of the protocol, and, if so, have other signatures which were not made expressly subject to ratification been treated as being effective forthwith?

Yours sincerely,

(Signed) E. BECKETT.

Annex 22

LETTER FROM H. MCKINNON WOOD OF THE LEGAL SECTION OF THE LEAGUE OF NATIONS SECRETARIAT TO THE FOREIGN OFFICE OF THE UNITED KINGDOM, DATED 13 JULY 1937, ENCLOSING A NOTE PREPARED BY THE TREATY REGISTRATION BRANCH OF THE LEAGUE OF NATIONS LEGAL SECTION (LEAGUE OF NATIONS ARCHIVES, FILE NUMBER 3C/19181/1589)

Dear Eric,

In reply to your letter of July 8th, reference E 3311/1027/44, I cannot do better than enclose the note on the subject which has been prepared in the Treaty Registration Branch of the Legal Section, from which you will see that the view which has been taken is that all signatures of the Protocol of Signature of the Statute of the Court are considered here to require ratification irrespective of their date, and that accordingly, so far as we know, Turkey is not bound by any of the instruments in question.

Yours sincerely,

(Signed) H. MCKINNON WOOD.

Dans la C.L.58.1936.V, à laquelle se réfère le Foreign Office, nous n'avons pas spécifié que ces signatures ne deviendraient effectives qu'après ratification, parce que ceci découle des dispositions mêmes du protocole de la Cour. La Turquie n'a pas encore déposé ses instruments de ratification et n'est pas considérée comme liée par aucun des actes en question.

Jusqu'à présent les signatures apposées au protocole de la Cour à des dates ultérieures à la conclusion ont toujours été considérées comme nécessitant la même procédure de ratification que les premières signatures.

Voici quelques exemples de pays qui ont signé à différentes dates après la conclusion du protocole:

Pays liés:

Allemagne: signature 10 décembre 1926, ratification 11 mars 1927; Ethiopie: signature 12 juillet 1926, ratification 16 juillet 1926; Pérou: signature 14 septembre 1929, ratification 29 mars 1932.

Pays non encore liés:

	Signatures
Etats-Unis d'Amérique	9 décembre 1929
République Argentine	28 décembre 1935
Guatémala	17 décembre 1926
Nicaragua	14 septembre 1929

Annex 23

LETTER FROM THE ACTING LEGAL ADVISER OF THE LEAGUE OF NATIONS TO THE MINISTER OF FOREIGN AFFAIRS OF NICARAGUA, DATED 30 NOVEMBER 1939 (LEAGUE OF NATIONS ARCHIVES, FILE NUMBER 3C/17664/1589)

[See I, *Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, p. 257]*

Annex 24

LETTER FROM JUDGE HUDSON TO MR. LESTER OF THE LEAGUE OF NATIONS SECRETARIAT, DATED 4 AUGUST 1942 (LEAGUE OF NATIONS ARCHIVES, FILE NUMBER 3C/17664/1589)

[See I, *Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, pp. 256-257]*

Annex 25

LETTER FROM THE ACTING LEGAL ADVISER OF THE LEAGUE OF NATIONS TO JUDGE HUDSON, DATED 15 SEPTEMBER 1942 (LEAGUE OF NATIONS ARCHIVES, FILE NUMBER 3C/17664/1589)

[See I, *Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, p. 256]*

Annex 26

LETTER FROM THE ACTING LEGAL ADVISER OF THE LEAGUE OF NATIONS TO THE MINISTER FOR FOREIGN AFFAIRS OF NICARAGUA, DATED 16 SEPTEMBER 1942 (LEAGUE OF NATIONS ARCHIVES, FILE NUMBER 3C/17664/1589)

[See I, *Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, p. 255]*

Annex 27

League of Nations *Official Journal Special Supplement* Number 193, Dated 10 July 1944, p. 43

WORK OF THE LEAGUE OF NATIONS IN THE MATTER OF INTERNATIONAL CONVENTIONS

SIGNATURES, RATIFICATIONS AND ACCESSIONS

in respect of Agreements and Conventions concluded under the auspices of the League of Nations

TWENTY-FIRST LIST

CHAPTER II. — PROCEDURES FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

SECTION I. THE PERMANENT COURT OF INTERNATIONAL JUSTICE

1. Revised Statute[1] of the Permanent Court of International Justice. Protocol of Signature of the Statute.

Geneva, December 16th, 1920[2].

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[1] The revision of the Statute was effected by a Protocol of Signature, dated September 14th, 1929, which came into force on February 1st, 1936 (registered under No. 3822, *Treaty Series*, Vol. 165, p. 353).

This Protocol provides as follows:

> "5. — After the entry into force of the present Protocol, the new provisions shall form part of the Statute adopted in 1920. . . .
>
> "6. — After the entry into force of the present Protocol, any acceptance of the Statute of the Court shall constitute an acceptance of the Statute as amended."

[2] Protocol registered under No. 170, see *Treaty Series*, Vol. 6, p. 379. For the revised text of the Statute, however, see Protocol of September 14th, 1929 (registration No. 3822, *Treaty Series*, Vol. 165, p. 353).

Signatures and ratifications subsequent to registration of Protocol dated December 16th, 1920: Vol. 11, p. 404; Vol. 15, p. 304; Vol. 24, p. 152; Vol. 27, p. 416; Vol. 39, p. 165; Vol. 45, p. 96; Vol. 50, p. 159; Vol. 54, p. 387; Vol. 69, p. 70; Vol. 72, p. 452; Vol. 78, p. 435; Vol. 88, p. 272; Vol. 92, p. 362; Vol. 96, p. 180; Vol. 100, p. 153; Vol. 104, p. 492; Vol. 107, p. 461; Vol. 111, p. 402; Vol. 117, p. 46; Vol. 126, p. 430; Vol. 130, p. 440; Vol. 134, p. 392; Vol. 147, p. 318; Vol. 152, p. 282; Vol. 156, p. 176; Vol. 160, p. 325; Vol. 164, p. 352; Vol. 168, p. 228; Vol. 172, p. 388; Vol. 177, p. 382; Vol. 181, p. 346; Vol. 185, p. 370; Vol. 189, p. 452; Vol. 196, p. 402; Vol. 197, p. 283; and Vol. 200, p. 484.

The Annex to the Supplementary Report on the Work of the League for 1929 (A.6*(a)*.1929, Annex) contains, moreover (p. 38), complete details concerning the Final Act of the Conference of States signatories of the Protocol of Signature of the Statute of the Permanent Court of International Justice, Geneva, September 23rd, 1926.

In Force.
Ratifications: 49

Union of South Africa	(August 4th, 1921)
Albania	(July 13th, 1921)
Australia	(Aug. 4th, 1921)
Belgium	(Aug. 29th, 1921)
Bolivia	(July 7th, 1936)
Brazil	(Novemb. 1st, 1921)
Brit. Empire	(Aug. 4th, 1921)
Bulgaria	(Aug. 12th, 1921)
Canada	(August 4th, 1921)
Chile	(July 20th, 1928)
China	(May 13th, 1922)
Colombia	(Jan. 6th, 1932)
Cuba	(January 12th, 1922)
Czecho-Slovakia	(September 2nd, 1921)
Denmark	(June 13th, 1921)
Dominican Republic	(February 4th, 1933)
Estonia	(May 2nd, 1923)
Ethiopia	(July 16th, 1926)
Finland	(April 6th, 1922)
France	(August 7th, 1921)
Germany	(March 11th, 1927)
Greece	(October 3rd, 1921)
Haiti	(September 7th, 1921)
Hungary	(Nov. 20th, 1925)
India	(August 4th, 1921)
Iran	(April 25th, 1931)
Ireland	
Italy	(June 20th, 1921)
Japan	(Novem. 16th, 1921)
Latvia	(February 12th, 1924)
Lithuania	(May 16th, 1922)
Luxemburg	(Sept. 15th, 1930)
The Netherlands	(August 6th, 1921)
New Zealand	(August 4th, 192
Norway	(August 20th, 192
Panama	(June 14th, 192
Paraguay	(May 11th, 193
Peru	(March 29th, 193
Poland	(August 26th, 1921
Portugal	(October 8th, 1921
Roumania	(Aug. 8th, 1921
Salvador	(Aug. 29th, 193
Spain	(August 30th, 1921
Sweden	(Feb. 21st, 1921
Switzerland	(July 25th, 1921
Thailand	(Feb. 27th, 192
Uruguay	(Sept. 27th, 1921
Venezuela	(Dec. 2nd, 1921
Yugoslavia	(Aug. 12th, 1921

Signatures not yet perfected by Ratification: 9

United States of America
Argentine Republic
Costa Rica
Egypt
Guatemala
Iraq
Liberia
Nicaragua
Turkey

Other Members or States which may sign the Protocol: [1]

Afghanistan
Sa'udi Arabia
Ecuador
Honduras
Mexico

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[1] Under the terms of the Assembly resolution of December 13th, 1920, in addition to Members of the League of Nations, the States mentioned in the Annex to the Covenant of the League of Nations may also sign.

Annex 28

NICARAGUAN INSTRUMENT OF RATIFICATION OF THE CHARTER OF THE UNITED NATIONS AND THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

[Not reproduced]

Annex 29

REPORT OF SUBCOMMITTEE D TO COMMITTEE IV/1 ON ARTICLE 36 OF THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, DATED 31 MAY 1945, DOCUMENT 702, *UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, DOCUMENTS*, VOL. 13, PP. 557-560 (ENGLISH), 562-565 (FRENCH)[1]

The Subcommittee has been entrusted with the study of Article 36 of the draft statute of the International Court of Justice relating to the nature of the jurisdiction of the Court. Two systems have been brought before the full committee, first, optional jurisdiction as provided in Article 36 of the present statute of the Permanent Court of International Justice, and, second, compulsory jurisdiction with provision for exceptions. Concerning the second system, a proposal had been submitted by the Delegate of New Zealand (Doc. WD47, IV/1/49 herewith), supported by the Delegates of Mexico and Australia. The New Zealand proposal was presented by its author as falling short of the intention of his government which favored compulsory jurisdiction pure and simple, and was offered in the hope of obtaining general agreement, reserving the position of his government.

A long debate took place, during which the arguments invoked in the Committee were reiterated and developed. It was pointed out particularly that certain states not parties to the statute of the Permanent Court of International Justice might find it difficult or impossible to accept obligatory jurisdiction at the present stage. It would therefore be unwise to attempt to make the latter system prevail without assuming the risk of compromising the accession of such states to the statute of the new court which is to be an integral part of the Charter.

On the other hand it was pointed out that the discussion in the full Committee had shown the existence of a great volume of support for extending the international legal order by recognising immediately, throughout the membership of the new Organisation, the compulsory jurisdiction of the Court. It was claimed that the New Zealand document, by expressly admitting agreed reservations, offered a compromise between the two Washington texts, and made easier the acceptance of the compulsory principle. The disadvantages of the optional clause were emphasised.

At the same time it was pointed out that the optional clause with reservations is not, from a practical point of view, very different from the system of compulsory jurisdiction with reservations.

The Subcommittee has carefully weighed the arguments pro and con with respect to both systems and has finally been led to the conclusion by majority that everything being taken into account, the system of optional jurisdiction at the present time would be more likely to secure general agreement.

By a vote of 7 against 5, the Subcommittee rejected a motion to take the New Zealand document as the basis of its further discussion.

By a subsequent vote of 8 against 3, the Subcommittee decided to take Alternative Text I in the Washington draft as the basis of its further discussion.

The Delegate of Canada proposed that there should be incorporated in

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[1] Not reproduced.

Paragraph 2 of Article 36 a list of permitted reservations, with liberty to add others. The Delegate of Australia proposed that there should be added an exhaustive list of permitted reservations, along the lines adopted in the General Act of 1928. By a vote of 6 against 3, however, the Subcommittee resolved to recommend that on this point Paragraph 2 be maintained in its present form.

The text proposed by the Subcommittee to the Committee is attached. This text is the same as that of the first alternative proposed for Article 36 by the Committee of Jurists of Washington, with the exception of the two following modifications:

(1) The end of paragraph 2 has been changed to read as follows . . . "the jurisdiction of the Court in all legal disputes concerning:"

This modification appears not only to be an improvement in form, but is also favorable to the jurisdiction of the Court, since it eliminates the distinctions which the present text seems to make.

(2) The new paragraph which follows (new paragraph 4) has been inserted after paragraph 3:

> "Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed as between the parties to the present Statute to have been made under this Article and shall continue to apply, in accordance with their terms."

The question of reservations calls for an explanation. As is well known, the article has consistently been interpreted in the past as allowing states accepting the jurisdiction of the Court to subject their declarations to reservations. The Subcommittee has considered such interpretation as being henceforth established. It has therefore been considered unnecessary to modify paragraph 3 in order to make express reference to the right of the states to make such reservations.

The desire to establish compulsory jurisdiction for the Court prevailed among the majority of the Subcommittee. However, some of these delegates feared that insistence upon the realization of that ideal would only impair the possibility of obtaining general accord to the statute of the Court, as well as to the Charter itself. It is in that spirit that the majority of that Subcommittee recommends the adoption of the solution described above.

Annex

Article 36

(1) The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of The United Nations or in treaties and conventions in force.

(2) The Members of The United Nations and the States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

(a) the interpretation of a treaty;
(b) any question of international law;
(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation.

(3) The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time.

(4) Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed as between the parties to the present Statute to have been made under this Article and shall continue to apply, in accordance with their terms.

(5) In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Annex 30

Proposals by the Delegation of France Relating to Article 36 of the Statute of the International Court of Justice, Dated 5 June 1945, ocument 947, *United Nations Conference on International Organization Documents*, Vol. 13, pp. 485 (English)[1], 486 (French)[2]

1. In paragraph (1) delete the words "in the Charter of the United Nations or".
2. In paragraph 3, add the following phrase:

> "This declaration shall be deposited with the Secretary-General of the United Nations."

3. Paragraph (4) should read:

> "(4) Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, as including acceptance of compulsory jurisdiction of the International Court of Justice for the time and under the conditions expressed in these declarations."

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[1] This document identical with WD186.

[2] Not reproduced.

Annex 31

SUMMARY REPORT OF NINETEENTH MEETING OF COMMITTEE IV/1, DATED 7 JUNE 1945, DOCUMENT 828, *UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION DOCUMENTS*, VOL. 13, PP. 282-284 (ENGLISH), 288-290 (FRENCH)[1]

Veterans Building, Room 202, June 6, 1945, 3:30 p.m.

The meeting was presided over by the Chairman, Manuel C. Gallagher.

1. *Procedure for Expediting the Meeting*

In order to attempt to cover all the items on the agenda it was suggested that the Committee might fix a time limit for discussion.

> *Decision: The Committee discussion should not exceed one-half hour for each item on the agenda.*

2. *Article 34 of the Statute*

The Committee considered the proposal submitted by the Delegation of Venezuela (WD 188, IV/1/24 (1)).

> *Decision: The Committee rejected a Venezuelan proposal to give the Court appellate jurisdiction.*
>
> *Decision: The Committee unanimously adopted paragraphs (1) and (2) of Article 34 of the draft approved by the Committee of Jurists (Jurist 82, G/69), reading as follows:*
>
> *"(1) Only States or Members of The United Nations may be parties in cases before the Court.*
>
> *"(2) The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative."*

The Chairman observed that a new paragraph (3) that had been added to Article 34 had already been adopted by the Committee and it was, therefore, unnecessary to discuss this paragraph.

3. *Article 35 of the Statute*

The Committee considered a proposed addition submitted by the Delegation of Egypt (Doc. 254, IV/1/17).

It was pointed out that paragraph 1 of the Egyptian proposal was identical with the corresponding paragraph of the draft approved by the Committee of Jurists.

> *Decision: The Committee unanimously adopted the text of Article 35 (1) as follows:*
>
> *"(1) The Court shall be open to the Members of The United Nations and also to States parties to the Statute."*

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[1] Not reproduced.

The Committee then considered paragraphs 2 and 3 of the Egyptian proposal, which relate to the conditions under which states not members of The United Nations may become parties to the Statute and the conditions under which the Court may be open to other states.

It was pointed out that the question as to what states are to be parties to the Statute should be decided in the Charter, while the question as to what states may appear before the Court in the case, once the Court is established, should be determined by the Statute. The Egyptian Representative proposed, however, that paragraph (2) of the draft approved by the Committee of Jurists, dealing with the latter subject, should become paragraph 6 of Chapter VII of the Charter.

It was felt that Article 35 as approved by the Committee of Jurists should be retained because the conditions under which states might become parties to the Statute or appear before the Court should be stated in the Statute.

The view was also expressed that the question as to what provision should be included in the Charter should be taken up when the appropriate section of the Charter is considered by the Committee. The Egyptian Representative stated that he would be willing to withdraw his amendment with the understanding that he might reopen the question in connection with the Charter. The Chairman pointed out that Article 35 had been adopted and was reopened only because of the Egyptian amendment.

> *Decision: Article 35 of the draft as previously approved is considered as adopted and the Egyptian proposal will be taken up in connection with the Charter.*

4. *Article 36 of the Statute*

The Committee considered the proposals submitted by the Delegations of Iran and France (WD 189, IV/1/65; WD 186, IV/1/60).

The French Delegate proposed that the words, "in the Charter of the United Nations or", be deleted in paragraph (1) of Article 36 since the Charter did not appear to confer jurisdiction in any case. However, another view was expressed that paragraph 6 of Chapter VIII A of the Charter related to compulsory references of cases to the Court by the Security Council. It was therefore agreed that there should be no deletion.

Both proposals contained provisions for addressing declarations regarding the optional clause to the Secretary-General.

> *Decision: The Committee unanimously decided that a new paragraph be inserted between the present paragraphs (3) and (4) of the Statute reading as follows:*
>
> *"This declaration shall be deposited with the Secretary-General of the United Nations who shall transmit a copy thereof to the parties to the Statute and to the registrar of the Court."*

The French Representative stated that the changes suggested by him in paragraph (4) were not substantive ones, but were intended to improve the phraseology.

> *Decision: The Committee unanimously approved paragraph (4) of Article 36 as follows:*
>
> *"(4) Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period during which they still have to run and in accordance with their terms."*

5. *Recommendations Regarding Compulsory Jurisdiction*

The Iranian Representative proposed that the Committee request the Steering Committee to recommend to members of The United Nations to make their declarations concerning compulsory jurisdiction of the Court as soon as possible. The Chairman stated that, since this proposal did not relate to the Statute, it should be considered after the Committee had finished its work on the text of the Statute.

6. *Article 38 of the Statute*

Decision: The Committee unanimously adopted a modified Chilean proposal (Doc. 253, IV/1/16) to add to Article 38.

Annex 32

Report of Rapporteur of Committee IV/1, Dated 12 June 1945, Document 913, *United Nations Conference on International Organization Documents*, Vol. 13, pp. 381, 384, 390-391 (English), 416, 419, 425-426 (French)[1]

[Page 381]

Part I. Introduction

The First Committee of the Fourth Commission was charged with the preparation of a draft of Chapter X of the Charter relating to the International Court of Justice and a draft of the Statute of the Court to be annexed to the Charter. In pursuance of this mandate, the First Committee presents proposals for inclusion in the chapter of the Charter dealing with the International Court of Justice, and a draft of the Statute of the Court.

Under the Chairmanship of His Excellency, Mr. Manuel C. Gallagher, Delegate of Peru, and during a period of his absence, of His Excellency, Mr. Arturo García, the First Committee has held twenty meetings, between May 4 and June 7, 1945. From time to time, it has created four subcommittees to report on particular questions. Many of the conclusions of the Committee were adopted by practically unanimous votes, and in all cases the proposed texts were approved by the requisite majority of at least two-thirds of the votes.

The Dumbarton Oaks Proposals gave evidence of a firm intention that an international court should play an important role in the new organization of nations for peace and security. An International Court of Justice was envisaged as one of the principal organs of the Organization, and as such it was to have the support of all members of the Organization. The Statute of the Court was therefore to be a part of the Charter of the Organization. It is indeed only natural that such prominence should be ascribed to the judicial process when an international organization is being created which will have as one of its purposes the settlement of disputes between states by peaceful means and with due regard to justice and international law.

[Page 384]

(2) The creation of the new Court will not break the chain of continuity with the past. Not only will the Statute of the new Court be based upon the Statute of the old Court, but this fact will be expressly set down in the Charter. In general, the new Court will have the same organization as the old, and the provisions concerning its jurisdiction will follow very closely those in the old Statute. Many of the features of the old Statute were elaborated from ideas which had already been current during several decades, and its provisions with reference to procedure — which it is now proposed to retain — were to a large extent borrowed from the Hague Conventions on Pacific Settlement of 1899 and 1907. In a similar way, the 1945 Statute will garnor what has come down from

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[1] Not reproduced.

the past. To make possible the use of precedents under the old Statute the same numbering of the articles has been followed in the new Statute.

In a sense, therefore, the new Court may be looked upon as the successor to the old Court which is replaced. The succession will be explicitly contemplated in some of the provisions of the new Statute, notably in Article 36, paragraph 4, and Article 37. Hence, continuity in the progressive development of the judicial process will be amply safeguarded.

(3) The creation of the new Court will give rise to certain problems which have been set forth in the report of the subcommittee and for some of which solutions have been proposed by the First Committee.

> *(a)* It is provided in Article 37 of the draft Statute that where treaties or conventions in force contain provisions for the reference of disputes to the old Court such provisions shall be deemed, as between the members of the Organization, to be applicable to the new Court.
>
> *(b)* It is provided in paragraph 4 of Article 36 of the draft Statute that declarations made under Article 36 of the old Statute and still in force shall be deemed as between parties to the new Statute to apply in accordance with their terms to the compulsory jurisdiction of the new Court.
>
> *(c)* Acceptances of the jurisdiction of the old Court over disputes arising between parties to the new Statute and other states, or between other states, should also be covered in some way,

[Pages 390-391]

[. . .] past a judge possessing the nationality of the state in which the Court had its seat has enjoyed the same privileges and immunities as other judges.

In Article 42, a provision was added that agents, advocates and counsel of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.

Article 34. Parties Before the Court

The First Committee approved the draft prepared by the Committee of Jurists which added to this article as it appeared in the old Statute a provision for the Court's requesting and receiving information from public international organizations. A further paragraph was added by the First Committee to provide a procedure for implementing the previous provisions, by which, when the Court is called upon to construe the constituent instrument of an organization or a convention adopted under it, the organization will be notified and will receive copies of the documents of the written proceedings. Article 26 of the old Statute has included a somewhat similar provision limited to labor cases.

Article 36. Compulsory Jurisdiction

The Committee of Jurists presented alternative texts of Article 36 dealing with the jurisdiction of the Court. One text followed that in the Statute of the Permanent Court of International Justice, leaving the acceptance of compulsory jurisdiction over legal disputes to the option of each state which is a party to the Statute; the other text provided for the immediate acceptance of such compulsory jurisdiction by all parties to the Statute. These texts were the subject of a long debate in the First Committee, which also had before it a draft providing for immediate acceptance of compulsory jurisdiction subject to stated reservations.

The debate revealed a sharp division of opinion on the general question. On one side stress was placed on the progress made since 1920 under the Statute of the Permanent Court of International Justice; at one time or another 45 states exercised the option to confer compulsory jurisdiction on the Court, though in instances this was for limited periods of time and subject to reservations. The discussion in the First Committee showed, in the words of a subcommittee, "the existence of a great volume of support for extending the international legal order by recognizing immediately throughout the membership of the new Organization the compulsory jurisdiction of the Court".

On the other side, the delegates of some states stated that their governments might find it difficult or impossible at this time to accept the compulsory jurisdiction of the Court, and they expressed their preference for the maintenance of the optional feature of Article 36. They felt that the adoption of this course would leave the way open for substantial advance toward the goal of universal jurisdiction, and that the Court would be placed on a firmer basis if the acceptance by states depended on their willing exercise of the option.

In an endeavor to reconcile the two points of view represented by the alternative texts proposed by the Committee of Jurists, much support was given to the third draft above mentioned, providing for immediate acceptance of compulsory jurisdiction subject to stated reservations. Some of the delegates supporting optional jurisdiction were, however, unable to accept this compromise. Other suggestions were made for amending the text of Article 36 in the optional form by incorporating permitted reservations, with or without liberty to add others. These suggestions were also rejected.

A subcommittee which made a report on the subject recommended the retention of the text in the Statute of the Permanent Court of International Justice with two changes designed to take into account the various views expressed by members of the Committee. The reference to "any of the classes" of legal disputes in paragraph 2 of Article 36 was omitted. A new paragraph 4 was inserted to preserve declarations made under Article 36 of the old Statute for periods of time which have not expired, and to make these declarations applicable to the jurisdiction of the new Court. In concluding its report, the subcommittee made the following statement:

> "The desire to establish compulsory jurisdiction for the Court prevailed among the majority of the Subcommittee. However, some of these delegates feared that insistence upon the realization of that ideal would only impair the possibility of obtaining general accord to the Statute of the Court, as well as to the Charter itself. It is in that spirit that the majority of the Subcommittee recommends the adoption of the solution described above."

The following statement from the subcommittee's report should also be noted:

> "The question of reservations calls for an explanation. As is well known, the article has [. . .]

Annex 33

SIGNATURE BY TURKEY OF THE PROTOCOL OF SIGNATURE OF THE STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE AND OF THE OPTIONAL CLAUSE CONCERNING THE PROTOCOL, LEAGUE OF NATIONS CIRCULAR LETTER 58.1936.V.

PROTOCOL OF SIGNATURE CONCERNING THE STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

(Geneva, December 16th, 1920)

AND OPTIONAL CLAUSE CONCERNING THIS PROTOCOL

PROTOCOL RELATING TO THE ACCESSION OF THE UNITED STATES OF AMERICA TO THE PROTOCOL OF SIGNATURE OF THE STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

(Geneva, September 14th, 1929)

SIGNATURE BY TURKEY

Geneva, 25 March 1936.

Sir,

I have the honour to inform you that the Permanent Delegate of Turkey accredited to the League of Nations signed, on behalf of his Government, on March 12th, 1936:

> The Protocol of Signature concerning the Statute of the Permanent Court of International Justice (Geneva, December 16th, 1920); and
>
> The Protocol relating to the accession of the United States of America to the Protocol of Signature of the Statute of the Permanent Court of International Justice (Geneva, September 14th, 1929).

The Permanent Delegate of Turkey signed at the same time the Optional Clause provided in the Protocol of Signature of the Statute of the Court, and made the following declaration:

(Translation):

On behalf of the Turkish Republic, I recognise as compulsory, ipso facto and without special agreement, in relation to any Member of the League of Nations or State accepting the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the Court in conformity with Article 36, paragraph 2 of the Statute of the Court, for a period of five years, in any of the disputes enumerated in the said Article arising after the signature of the present declaration, with the exception of disputes relating directly or indirectly to the application of treaties or conventions concluded by Turkey and providing for another method of peaceful settlement.

Geneva, March 12th, 1936.

(Signed) Cemal Hüsnü TARÂY.

I have the honour to be, Sir,

Your obedient Servant,

For the Secretary-General:
Legal Adviser of the Secretariat.

Annex 34

SUBMISSION OF THE *KING OF SPAIN ARBITRAL AWARD* CASE, WITH APPENDICES

The delimitation of boundaries has been a recurrent problem for Latin American republics ever since their independence from Spain. In the case of the Honduran/Nicaraguan frontier, questions began to arise as early as the 1850's. In 1894, after considerable correspondence, the two countries signed a boundary treaty (the Gamez-Bonilla Treaty) which provided for demarcation of the common frontier by a Mixed Commission and arbitration of any points of demarcation not agreed. The Mixed Commission completed its work on 29 August 1904, leaving for arbitration only that portion of the border between the Atlantic Ocean and the Portillo de Teotecacinte. The King of Spain was subsequently selected as arbitrator; and his award, which was announced on December 23, 1906, confirmed in essence the position taken by Honduras. *I.C.J. Pleadings, Arbitral Award made by the King of Spain on 23 December 1906*, Vol. I, at pp. 18-26.

It was not until 1911 that Honduras proposed to Nicaragua that they mark the land portion of the boundary as determined by the award. Nicaragua responded the following year by asserting that, for a variety of reasons, the award was null and void. The boundary dispute was thus renewed, and there ensued decades of intermittent border incidents and occasional initiatives by one country or the other aimed at resolving the problem.

Beginning at least as early as 1955, the Government of Honduras considered seriously the possibility of referring the dispute to the International Court of Justice. In January 1958, after lengthy negotiations under the auspices of the Organization of American States with United States participation, the dispute was referred to the Court as the result of a special bilateral agreement. Had it not been for the perceived ineffectiveness of Nicaragua's 1929 declaration and Nicaragua's failure to affirm clearly a willingness to go to the Court, Honduras could have taken the case to the Court by unilateral application some years earlier.

Documents from United States diplomatic archives demonstrate that Honduras did not believe Nicaragua was bound to the compulsory jurisdiction of the Court. In a conversation with United States Ambassador Whiting Willauer on 4 April 1955, Honduran Foreign Minister Esteban Mendoza stated that he was "seriously contemplating attempting an agreement with Nicaragua to submit the matter to the International Court of Justice". Appendix A. The following month, Honduran Ambassador to the United States Carlos Izaguirre attempted to enlist the assistance of the United States in achieving such an agreement. On May 19, he suggested to Assistant Secretary of State for Inter-American Affairs Henry Holland that the United States propose to both governments that they refer the matter to the Court. He argued that the time was "opportune for the approach of a third party to whom both governments would lend ear" and that if his government were approached informally in advance and "assurred (sic) that [Nicaraguan President] Somoza would accept the proposal", it would "react affirmatively". Appendix B. The only reasonable inference to be drawn from these conversations is that responsible officials within Honduras did not believe Nicaragua would appear in the absence of a special agreement conferring jurisdiction on the Court. They did not believe they could compel Nicaragua to appear before the Court on the basis of matching declarations.

Indeed, on 15 June 1955, Ambassador Izaguirre forwarded to the Department of State "two memoranda which set forth definitively the position of Honduras with respect to the Award of the King of Spain". One of these memoranda dealt with Nicaraguan acceptance of compulsory jurisdiction, stating (in translation):

> "Nicaragua has refused until now to recognize the compulsory jurisdiction of the International Court of Justice so that the Court could take cognizance of and resolve the case which Honduras has considered filing against Nicaragua. Nicaragua had suggested that the two countries sign a kind of special protocol to submit the problem to the Court so that it could declare whether or not the award is valid. We could not agree to this because it would mean that we are unsure of the validity of the award when, on the contrary, we are absolutely certain of it.
>
> In view of the foregoing, the Government of Honduras respectfully requests that the Government of the United States use its good offices to the end that Nicaragua accept the compulsory jurisdiction of the Court so that Honduras may present the case referred to above.
>
> Honduras is willing to appear before the International Court of Justice, not so that this tribunal may decide whether or not the award is valid but so that it may order Nicaragua to execute the award precisely because of its definitive and binding character."

APPENDIX C.

Later in the summer of 1955, Honduras retained former Judge Manley O. Hudson to study and prepare its case before the Court. Appendix D. In December 1957, Honduran Foreign Minister Mendoza came to the United States to meet with Judge Hudson. Shortly before Minister Mendoza's departure from Tegucigalpa, he had a conversation with United States Ambassador Willauer, who reported on December 8:

> "[Judge Hudson] will be asked by [Foreign Minister] Mendoza . . . whether there is any means of forcing Nicaragua to come before the Court. If the answer is negative the Foreign Minister believes that Honduras will have to bring the matter before the Organization of American States with an accusation that Nicaragua is an aggressor in occupying territory beyond the line laid down by the Award of the King of Spain of December 23, 1906."

APPENDIX E.

On December 19, following his visit with Judge Hudson, Foreign Minister Mendoza met privately with Assistant Secretary of State Holland and reported that the border situation had become "intolerable" for the Honduran Government and that "a definitive solution must be found". He outlined three courses which were open to Honduras:

> "(1) she could settle the matter by recourse to arms; (2) refer the matter to the International Court of Justice which she was willing to do, but there was some question as to the feasibility of this since the Nicaraguan Government had not accepted the compulsory jurisdiction of the Court; (3) refer the matter to the OAS under the appropriate provision of the Rio Treaty."

APPENDIX F.

At this meeting, he left an Aide-Memoire requesting the United States to ask Nicaragua the significance of its having advised the Secretary General of the League of Nations on 29 November 1939 that it had ratified the Protocol of Signature of the Statute of the Permanent Court and that the instrument of ratification would follow[1]. He also left a memorandum entitled "Honduras and Nicaragua", which concluded with the statement that the author (unnamed) "would not be surprised if the Court should say that Nicaragua is not bound to submit to its jurisdiction". The Department of State believed at the time that the memorandum had been written by Judge Hudson. Appendix G. A copy of the memorandum has been obtained from Judge Hudson's papers at the Harvard Law School Library. See Annex 37. That Honduras did not consider that it could rely on Nicaragua's 1929 declaration by operation of the Article 36 (5) of the Court's Statute was reaffirmed two months later by Ambassador Izaguirre. A 20 February 1956 memorandum of conversation with the Ambassador records that:

> "Honduras, according to the Ambassador, is willing to take the dispute to the International Court of Justice *if* Nicaragua *will accept* the Court's jurisdiction. . . . However, . . ., Nicaragua would have to agree to the court procedure because it is not a party to the convention and is not obliged to appear." (Italics added.)

APPENDIX J.

Honduras' assessment, moreover, was confirmed by Nicaragua's Ambassador to the United States. On 21 December 1955, Ambassador Guillermo Sevilla Sacasa[2] visited the Department of State and was informed that Honduras "felt that the best means of settling the dispute would be through reference" to the Court and that Honduras' only reservation was with regard to the terms of reference. After a discussion of different possible terms of the submission, the memorandum of conversation for this meeting notes:

> "Reference was made to the fact that the matter had not been previously referred to the Court because Nicaragua had never agreed to submit to compulsory jurisdiction.
>
> Ambassador Sevilla Sacasa indicated that an agreement between the two countries would have to be reached to overcome this difficulty."

APPENDIX K.

In another conversation with the same Department officer on 2 March 1956, the Nicaraguan Ambassador stated:

> ". . . Nicaragua would *probably* go to the International Court of Justice if summoned by Honduras. It was not feasible, however, for Nicaragua to summon Honduras to the Court. There is some doubt as to whether Nica-

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[1] In response, the Department asked the Embassy in Managua for an appraisal of "the degree of seriousness of the Nicaraguan interest in referring the dispute to the International Court of Justice". Appendix H. The Embassy responded that Nicaragua was "agreeable to [asking the Court] to determine whether or not the Award [was] valid or null". Appendix I.

[2] Sevilla Sacasa had been Nicaragua's representative to the Committee of Jurists in Washington in 1945 and a senior member of Nicaragua's delegation to the San Francisco Conference.

ragua would be officially obligated to submit to the International Court because an instrument of ratification of acceptance of the Court's jurisdiction *was never sent*, although in 1939 a telegram was sent by the Nicaraguan Foreign Minister giving *informal* acceptance." (Italics added.)

APPENDIX L.

Thus, Nicaragua through its Ambassador to the United States — who had been Nicaragua's delegate to the Washington Committee of Jurists as well as a member of the Nicaraguan Delegation to the San Francisco Conference that adopted the United Nations Charter, and who had been intimately involved in a wide variety of Nicaraguan foreign relations problems — acknowledged that it had not formally bound itself to the compulsory jurisdiction of the International Court of Justice. In Nicaragua's view, its appearance before the Court if summoned by Honduras was optional ("it would probably go"), and it could not itself compel the appearance of another State because of its own lack of a reciprocal undertaking to accept this Court's compulsory jurisdiction. Nicaragua made no claim that its 1929 declaration could have been brought into force by its joining the United Nations.

Nothing came immediately of Honduran efforts to craft a case for presentation to the Court. In December 1956, however, with the fiftieth anniversary of the award, pressure began to mount in Honduras for decisive action to resolve the longstanding dispute. Appendix M. On 21 February 1957, the Honduran government created a new department in the disputed area and moved in troops. This action was explained by the United States Embassy after conversations with top Honduran officials in the following terms:

> "Taken at face value result is gratifying and situation not nearly as critical as might otherwise appear. Honduran activities center on two considerations: First, in addition to other attempts ever since [early] 1956 Honduras attempting to get Nicaragua appear before international court or other neutral body to settle boundary problem and note of [January 1956 proposing a mixed commission to delimit the boundary in accordance with the arbitral award] never to date been acknowledged. Thus Honduras hoping by this action as primary and peaceful objective to stimulate Nicaragua to either arbitrate or bilateral negotiation."

APPENDIX N[1].

Nicaragua protested the creation of the new department by Honduras. On 15 March 1957, the Honduran Foreign Minister addressed a letter to his Nicaraguan counterpart reaffirming his government's willingness to submit the dispute to the Court. In the letter, he contrasts Honduras' acceptance of compulsory jurisdiction under the Court's Statute with Nicaragua's having entered a reservation to the Pact of Bogotá "as to the peaceful settlement provided by that inter-American Treaty with respect to arbitral awards whose validity it had contested" ("de las soluciones pacíficas que contempla dicho Tratado Americano en relación con las sentencias arbitrales cuya validez hubiera impugnado"). Appendix O. There is no mention of the declaration made by the Nicaraguan Foreign Minister in 1929 with regard to the Permanent Court of

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[1] Substantive changes have been made in this sentence in accordance with corrections indicated in a later telegram. The two telegrams are appended as Appendix N and should be read together.

International Justice. Clearly Honduras did not believe it could compel Nicaragua to appear before the present Court — either on the basis of Nicaragua's 1929 declaration or through reliance on the Pact of Bogotá.

Nicaragua's reply, moreover, sidestepped the issue of compulsory jurisdiction. While reaffirming Nicaragua's commitment to resolve disputes by peaceful means established under international law, it appeared to give Honduras sole responsibility for applying to the Court. Nicaraguan Foreign Minister Montiel Argüello wrote:

> "The fact that Nicaragua has not applied to any international tribunal to contest the award can in no case be interpreted as favoring the position taken by your Government, for, on the contrary, it would be incumbent upon your Government to have recourse to such a tribunal."
>
> ("El hecho de que Nicaragua no haya ocurrido hasta ahora a impugnar el Laudo ante ningún tribunal internacional no puede interpretarse en ningún caso en favor de la tesis que sostiene el vuestro, pues más bien a éste es a quien correspondería el recurso a dicho tribunal.")

APPENDIX P.

With this indirect and evasive answer to Honduras' open offer to take the dispute to the Court, it is perhaps not surprising that Honduras was not anxious to test Nicaragua's willingness to accept jurisdiction by making an entirely unilateral application.

Instead, on 1 May 1957, Honduras addressed the Organization of American States and called for the convocation of the Organ of Consultation pursuant to the Rio Treaty, whose function is to address threats to the peace of the Americas. The Organ of Consultation was convened and, over the months of May and June, appointed, first, a committee to investigate the situation on the Honduras/Nicaragua frontier and, then, an Ad Hoc Committee with the task of helping the parties reach an agreement on a definitive resolution of the dispute[1].

During May 1957, the Honduran and Nicaraguan Ambassadors to the Organization of American States confirmed to the Department of State their government's respective positions regarding recourse to the Court. Honduras wanted to go to the Court. Appendix Q. Nicaragua was reluctant. On 27 May 1957, Nicaraguan Ambassador Sevilla Sacasa described Nicaragua's position as follows:

> "The Ambassador stated that many persons mentioned only the International Court of Justice as a means for solving the problem. Nicaragua feels, however, that there are a number of methods that must first be tried prior to any submission to the court. This further effort would be 'required' by the Inter-American system, according to the Ambassador. If the Foreign Ministers' meeting at Antingua [sic: "Antigua"][2] does not resolve anything, the Government of Nicaragua is prepared to initiate other steps such as

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[1] For the complete proceedings of the Organ of Consultation, see OEA, Actas de las sesiones de Consejo actuando provisionalmente como Organo de Consulta, Serie del Consejo C-a-245, -246, -248, -249, -250, -252, -254 (1957).

[2] In addition to the OAS meetings, the Foreign Ministers of Guatemala, Costa Rica, and El Salvador offered their good offices to resolve the dispute. Toward this end, a meeting was held in Antigua, Guatemala, May 27-30, 1957.

submission to various American authorities or to the United States for settlement. The Ambassador also intimated that he was working on various approaches to the problem here in Washington and that there [sic: "these"] would be revealed at the proper time, if necessary.

* * *

As a final recourse, Nicaragua would appear under the Pact of Bogotá for submission of the dispute to the ICJ; but the Ambassador left some doubt as to what terms of reference might be suitable for both parties."

APPENDIX R.

In short, Nicaragua's position was that it would prefer any other method of peaceful settlement to recourse to the Court, that it believed it had a legal right o insist on pursuit of available alternatives, and that, only as a last resort and nder the Pact of Bogotá, would it consent to appear before the Court. Nicaragua's position reflects both the "contingent" nature of the jurisdictional lause contained in the Pact of Bogotá (see Annex 39) and Nicaragua's understanding that it was not bound under the Statute of this Court itself by any other declaration.

In early June of 1957, the Ad Hoc Committee of the Organ of Consultation proposed three alternatives for settlement to the two governments and invited hem to select the procedure they considered preferable. The options stated were: 1) a special ad hoc arbitral tribunal, (2) a sole arbiter selected by agreement, or (3) reference to this Court. Appendix S. The Parties selected recourse to the Court, and executed a written agreement to this effect before the Organization of American States. The first operative paragraph of the Washington Agreement of 21 July 1957, provides:

> "The Governments of Honduras and Nicaragua shall submit to the International Court of Justice, in accordance with its Statute and Rules of Court, the disagreement existing between them with respect to the Arbitral Award handed down by His Majesty The King of Spain on 23 December 1906, with the understanding that each, in the exercise of its sovereignty and in accordance with the procedures outlined in this instrument, shall present such facets of the matter in disagreement as it deems pertinent."

I.C.J. Pleadings, Arbitral Award Made by the King of Spain on 23 December 1906, Vol. I, at p. 26. In explaining Nicaragua's acceptance of recourse to the Court, Nicaraguan Ambassador Guillermo Sevilla Sacasa (who served as that country's Ambassador to the OAS as well as to the United States) gave Honduras sole responsibility for selection of this method of resolving the dispute:

> "My Government accepted the judicial procedure which the Government of Honduras considered appropriate for the resolution of this dispute. Judicial recourse is provided for in the Pact of Bogotá; it is a means of pacific settlement and as such satisfies Nicaragua's known position that the dispute be settled by pacific means recognized by international law."

> ("Mi Gobierno aceptó el procedimiento judicial que le pareció apropiado al Gobierno de Honduras para la solución del litigio. El procedimiento

> judicial está previsto en el Pacto de Bogotá; es un medio pacífico y como tal satisface la conocida tesis de Nicaragua, de que el litigio sea resuelto por los medios pacíficos que consagra el Derecho Internacional.")

OEA, Acta de la sesión del Consejo actuando provisionalmente como Organo de Consulta celebrada el 28 de junio de 1957, Serie del Consejo C-a-252, at p. 43 (1957).

The Washington Agreement provided that Honduras would file an application instituting proceedings against Nicaragua in the Court. In its application, for reasons which have never been made clear, Honduras cited not only the Washington Agreement but also Article 36 (2) as bases for the Court's jurisdiction. Nicaragua, in reply, strongly objected to the invocation of Article 36 (2), contending that jurisdiction rested solely on the *compromis*; and Honduras subsequently withdrew any reliance on Article 36 (2). For relevant citations, see paragraphs 118-120 of the Memorial.

In this case, Nicaragua claims that its conduct historically has evidenced an implied consent to accept the Court's compulsory jurisdiction. Yet when Nicaragua was the prospective defendant, its attitude was just the opposite. In the discussions preceding the *King of Spain* case, Nicaragua refused to state that it had accepted compulsory jurisdiction, despite invitations to do so. On the contrary, it represented by its actions and words to the United States and Honduras that it had not. Indeed, the Nicaraguan Ambassador indicated that a special agreement with Honduras would be necessary to submit the dispute to the Court because Nicaragua had not accepted compulsory jurisdiction. In the face of an open Honduran plea to go to the Court, the Nicaraguan Foreign Minister virtually dared Honduras to make a unilateral application while at the same time refusing to clarify whether his government would appear if summoned. Ultimately, a special *compromis*, negotiated under the auspices of the OAS, was necessary to provide a basis of jurisdiction. It had taken two years and great efforts by Honduras to persuade Nicaragua to agree to submit the case to the Court. Quite clearly, Nicaragua did not believe, or act as if, its declaration of 1929 was in force.

APPENDICES

A. "Nicaraguan-Honduran Boundary Dispute", Despatch from United States Embassy in Honduras to Department of State, dated 5 April 1955
B. "United States Initiative in Referral of Honduras-Nicaragua Boundary Dispute to International Court of Justice", Department of State Memorandum of 19 May 1955
C. Note from Ambassador Izaguirre of Honduras to Department of State, dated 15 June 1955, enclosing two memoranda
D. "Honduras-Nicaragua Boundary Question", Despatch from United States Embassy in Costa Rica to Department of State, dated 10 August 1955
E. "Foreign Minister to Travel to United States on Boundary Matter", Despatch from United States Embassy in Honduras to Department of State, dated 8 December 1955
F. "Honduran-Nicaraguan Boundary Dispute", Department of State Memorandum of Conversation, dated 19 December 1955
G. "Honduran-Nicaraguan Boundary Dispute", Department of State Memorandum, dated 22 December 1955

H. "Honduran-Nicaraguan Boundary Dispute", Department of State Instruction to United States Embassy in Nicaragua, dated 12 January 1956
I. "Nicaraguan-Honduran Border Dispute", Despatch from United States Embassy in Nicaragua to Department of State, dated 24 January 1956
J. "Honduran-Nicaraguan Border Dispute", Department of State Memorandum of Conversation, dated 20 February 1956
K. "Honduran-Nicaraguan Boundary Dispute", Department of State Memorandum of Conversation, dated 21 December 1955
L. "Nicaraguan-Honduran Border Dispute", Department of State Memorandum of Conversation, dated 2 March 1956
M. "Revival of Honduran-Nicaraguan Border Controversy", Despatch from United States Embassy in Nicaragua to Department of State, dated 31 December 1956
N. Telegrams from United States Embassy in Honduras to Department of State, dated 5 and 8 March 1957
O. "Honduras Offers to Submit Differences with Nicaragua to International Court of Justice", Despatch from United States Embassy in Honduras to Department of State, dated 19 March 1957, enclosing Note from the Minister of Foreign Relations of Honduras to the Ministers of Foreign Affairs of the Americas and Spain, dated 15 March 1957
P. Despatch from United States Embassy in Honduras to Department of State, dated 21 March 1957, enclosing Note from Minister of Foreign Affairs of Nicaragua to Minister of Foreign Affairs of Honduras, dated 19 March 1957, and an article from *El Dia*, 20 March 1957
Q. "Courtesy Call on Honduran Ambassador", Department of State Memorandum of Conversation, dated 20 May 1957
R. "Nicaraguan-Honduran Border Situation", Department of State Memorandum of Conversation, dated 27 May 1957
S. "Telegram from Department of State to United States Embassies in Nicaragua and Honduras, dated 10 June 1957

APPENDIX A

"NICARAGUAN-HONDURAN BOUNDARY DISPUTE", DESPATCH FROM UNITED STATES EMBASSY IN HONDURAS TO DEPARTMENT OF STATE, DATED 5 APRIL 1955

In a conference April 4 with Foreign Minister MENDOZA regarding the Nicaraguan boundary dispute, the Foreign Minister stated he had heard that Nicaragua is still planning to press for territory west of the line awarded by the King of Spain in 1906 (Rio Coco). Mendoza told the Ambassador that he would rather resign from his post as Foreign Minister than be a party to any politically suicidal concession of this nature.

In the light of the above information the Foreign Minister does not believe that economic concessions which had been previously discussed as a substitute for territorial concessions will be agreed to and is now seriously contemplating attempting an agreement with Nicaragua to submit the matter to the International

Court of Justice. Before doing so the Foreign Minister intends to consult expert American lawyers on international law and confidentially mentioned the name of Governor DEWEY.

(Signed) Whiting WILLAUER.

APPENDIX B

"UNITED STATES INITIATIVE IN REFERRAL OF HONDURAS-NICARAGUA BOUNDARY DISPUTE TO INTERNATIONAL COURT OF JUSTICE", DEPARTMENT OF STATE MEMORANDUM OF 19 MAY 1955

Ambassador Izaguirre of Honduras, in a conversation with Messrs. Ohmans and Leddy today, suggested that the United States take the initiative in settlement of the border dispute between Honduras and Nicaragua, by suggesting to both governments that they refer the matter to the International Court of Justice at The Hague. Emphasizing that he was speaking personally, and without instructions from his Government, Ambassador Izaguirre said he thought the time is opportune for the approach of a third party to whom both governments would lend ear, such party to be the Secretary of State of the United States. Informal sounding of each government as to its receptivity of this suggestion might be desirable in advance. He felt that if Honduras were thus approached, and assurred that Somoza would accept the proposal, Honduras would react affirmatively. As to whether or not the OAS, perhaps through its Secretary General, should be the recommendable third party to take this initiative, Ambassador Izaguirre could see no reason to oppose this approach but felt that more force would come from the United States initiation of the proposal, which could then be backed by the Secretary General of the OAS to give the conviction of his support.

No comment was made by either Mr. Ohmans or Mr. Leddy, other than their desire to refer the matter to their superiors for consideration.

Recommendation:

The proposal has merit, which we have previously recognized in our cables to Tegucigalpa and Managua on May 11, copy attached[1]; no reply has been received from either Embassy. To carry through on this undertaking, further instruction should be sent, per the attached draft.

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[1] Not reproduced.

APPENDIX C

NOTE FROM AMBASSADOR IZAGUIRRE OF HONDURAS TO DEPARTMENT OF STATE, DATED 15 JUNE 1955, ENCLOSING TWO MEMORANDA

Department of State, Division of Language Services
(Translation)

LS No. 113594
FA/BP
Spanish.

EMBASSY OF HONDURAS
WASHINGTON, D.C.

(Handwritten note in English: No prev[ious] in files '50-59 No translations have been found 1/18/65)

15 June 1955.

Dear Mr. Leddy:

Pursuant to the conversation I had the honor to have with you on Monday, I am enclosing two memoranda which set forth definitively the position of Honduras with respect to the Award of the King of Spain.

Please remain assured of my highest consideration.

(Signed) Carlos IZAGUIRRE,
Ambassador of Honduras.

(Handwritten note:
No prev[ious] in '50-59 files
No translations have been found
as of 1/18/65)

MEMORANDUM NO. 1

1 — Honduras considers that the Award of the King of Spain which fixed the boundary between both countries ended the controversy, as both States had in advance committed themselves to consider the arbitral award as having the effect of a perfect, perpetual and binding treaty from which there would be no appeal.

2 — As a consequence of the foregoing, Honduras cannot in any event submit the boundary question to a new arbitration or to mediation.

3 — Nor is it advisable to appeal to the Organization of American States because, in the first place, upon signing the Charter of Bogotá, which created the Organization, Nicaragua made a very broad reservation, saying "that no provision of the present Charter shall be applicable to controversies which Nicaragua considers have already been resolved by arbitral judgments or awards".[*] This reservation was obviously made to prevent the Organization of

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[*] Translator's note: This statement is in error. Nicaragua made no reservation whatsoever to the OAS Charter, nor did it make a reservation in these terms to any other OAS treaty. Honduras apparently intended to refer here to the Nicaraguan reservation to the Pact of Bogotá, which Honduras later cited as a reason that the dispute with Nicaragua had not been resolved. (See Appendix O, this Annex.)

American States from hearing our boundary question with Nicaragua. Moreover, because there is already an arbitral award which Honduras has recognized as binding and definitive, the present problem is essentially juridical in nature and, therefore, could not be submitted to the Council of the Organization of American States for resolution, as the latter is not a true tribunal and, for that reason, lacks authority to order execution [of the award].

4 — For the reasons given, there is no alternative but to appeal to the International Court of Justice, which sits in The Hague, to end the dispute. Honduras is willing to petition the Court, asking that in view of the binding and definitive character of the Award of the King of Spain, Nicaragua be ordered to execute it promptly and in good faith. By requesting execution of the Award, we are implicitly reaffirming its validity.

5 — Nicaragua has refused until now to recognize the compulsory jurisdiction of the International Court of Justice so that the Court could take cognizance of and resolve the case which Honduras has considered filing against Nicaragua. Nicaragua had suggested that the two countries sign a kind of special protocol to submit the problem to the Court so that it could declare whether or not the award is valid. We could not agree to this because it would mean that we are unsure of the validity of the award when, on the contrary, we are absolutely certain of it.

In view of the foregoing, the Government of Honduras respectfully requests that the Government of the United States use its good offices to the end that Nicaragua accept the compulsory jurisdiction of the Court so that Honduras may present the case referred to above.

Honduras is willing to appear before the International Court of Justice, not so that this Tribunal may decide whether or not the award is valid but so that it may order Nicaragua to execute the award precisely because of its definitive and binding character.

MEMORANDUM No. 2

On Friday, June 2, the Commission of Lawyers and Engineers sent by Honduras to investigate the border zone where the latest disturbances took place returned along with the Nicaraguan commission members. The investigation revealed that the Nicaraguans were indeed working in territory which had been demarcated as Honduran since 1901, and, as a result, the Government of Nicaragua has withdrawn a military guard which it had in that same place.

This fact, though it may seem insignificant, demonstrates that Honduras was correct in alleging that Nicaraguans were violating its territorial sovereignty and, similarly, that it was justified in sending troops to that part of the border.

If Nicaragua had not recognized that its guards were in Honduran territory, it clearly would not have ordered their withdrawal. The withdrawal is confirmed in documents signed by representatives of both States.

Although in this case Honduras could have appealed to the Organization of American States under Article 6 of the Inter-American Treaty of Reciprocal Assistance, signed in Rio de Janeiro, inasmuch as a violation of Honduran national territory took place, the Government of Honduras did not do so, thus showing its strong desire to resolve border problems amicably and to help in this way to give effect to the policy of peace and tranquility which the United States Government seeks for these countries.

APPENDIX D

"HONDURAS-NICARAGUA BOUNDARY QUESTION", DESPATCH FROM UNITED STATES EMBASSY IN COSTA RICA TO DEPARTMENT OF STATE, DATED 10 AUGUST 1955

Licenciado Celeo DAVILA, for many years an attorney for the United Fruit Company, informed an Embassy Officer today as follows:

He has definitely accepted the assignment to represent Honduras before the International Court of Justice at The Hague on the boundary question with Nicaragua. During a recent trip to Boston he informed United Fruit Company officials there that he would resign in order to take the assignment with the rank of Ambassador. During this same trip he engaged the services of Professor Manley O. Hudson, well-known international law expert of Harvard, who, he stated, is a former justice of the Court. The latter accepted with the proviso that he be granted a five-month period to study and prepare Honduras' case. Davila agreed to this. Hence, provided Nicaragua's agreement is secured, the case would not come before the Court until some time early next year.

For the Ambassador:
(Signed) Alex A. COHEN,
Attaché.

APPENDIX E

"FOREIGN MINISTER TO TRAVEL TO UNITED STATES ON BOUNDARY MATTER", DESPATCH FROM UNITED STATES EMBASSY IN HONDURAS TO DEPARTMENT OF STATE, DATED 8 DECEMBER 1955

Foreign Minister MENDOZA told me yesterday that accompanied by Celeo DAVILA he is going to the States on Saturday, December 10, travelling incognito for the purpose of discussing with ex-member of the International Court, Dr. Manley HUDSON, the problem of the Nicaraguan-Honduran boundary dispute. As will be recalled, Dr. Hudson has been studying the case in behalf of Honduras for over six months. He will be asked by Mendoza and Davila whether there is any means of forcing Nicaragua to come before the Court. If the answer is negative the Foreign Minister believes that Honduras will have to bring the matter before the Organization of American States with an accusation that Nicaragua is an aggressor in occupying territory beyond the line laid down by the Award of the King of Spain of December 23, 1906. The Foreign Minister remarked that he felt this might be embarrassing to the United States for which he would be very sorry but added that public pressure in Honduras is so great that vigorous action to bring the whole question to an ultimate decision must be made by the Government.

Comment: With the forthcoming campaign it is clear that the Foreign Minister wants to take steps which will checkmate any opposition "capital" being made of the issue.

(Signed) Whiting WILLAUER.

APPENDIX F

"HONDURAN-NICARAGUAN BOUNDARY DISPUTE", DEPARTMENT OF STATE MEMORANDUM OF CONVERSATION, DATED 19 DECEMBER 1955

Participants: Dr. F. Esteban Mendoza, Foreign Minister of Honduras,
Ambassador Izaguirre of Honduras,
ARA — Mr. Holland,
MID — Mr. Newbegin.

Honduran Foreign Minister Mendoza, who is on a visit to the United States incognito, called on Mr. Holland at the latter's residence today. Dr. Mendoza informed Mr. Holland that he had come to the United States in connection with the Honduran-Nicaraguan border dispute. He had spent the last few days in Boston discussing the problem with Manley O. Hudson, Professor of International Law at Harvard and former Justice on the World Court. Dr. Mendoza pointed out that there had been in the past year three instances of Nicaraguan aggression against Honduras along the joint frontier as set forth by the award of the King of Spain. He added that the situation had become intolerable and a definitive solution must be found. In this connection he contended that not only were the Hondurans greatly disturbed by the threat of continued depredations by the Nicaraguans, but communist elements, particularly along the north coast of Honduras, were taking advantage of the situation to stimulate popular excitement and student demonstrations. He indicated that the situation was becoming impossible for the de facto government of Lozano which represented the three parties since it was open to charges of doing nothing to find a solution. The Foreign Minister stated that three courses were open to Honduras: (1) she could settle the matter by recourse to arms; (2) refer the matter to the International Court of Justice which she was ready and willing to do, but there was some question as to the feasibility of this since the Nicaraguan Government had not accepted the compulsory jurisdiction of the Court; (3) refer the matter to the OAS under the appropriate provision of the Rio Treaty. The Foreign Minister told Mr. Holland that Honduras was anxious not to do anything to embarrass the United States in any way although it was clear that the continuance of this controversy would not only be detrimental to Honduras and Nicaragua, but would inevitably involve the United States and other nations of the Hemisphere.

A rather lengthy discussion followed regarding the possibility of referring the border dispute to the International Court. Dr. Mendoza said that it was entirely agreeable to Honduras either to make charges against Nicaragua or to have Nicaragua make charges against Honduras. Such charges would be to the effect that either country was illegally occupying part of the territory of the other. Dr. Mendoza was emphatic that the dispute could not be referred to the ICJ on the basis that the latter should determine whether or not the award of the King of Spain was valid. Since the Nicaraguans maintained that the award was null and void this procedure would of course be agreeable to them. On the other hand, were the Hondurans to agree to such a proposition it would indicate that they had some doubt as to the validity of the award and the Hondurans had none. Mr. Holland expressed the hope that some means might be found to refer the matter to the ICJ. He stated that we would be glad, on a purely informal basis and without responsibility on the part of anybody concerned, to discuss the matter informally with the Nicaraguans to see if some solution along these lines might be found.

Dr. Mendoza then stated that the third possibility was to refer the matter to the OAS under the appropriate provision of the Rio Treaty on the basis that Honduras had suffered an aggression. This would mean, of course, the convening of a meeting of the Foreign Ministers with the OAS Council acting provisionally on their behalf. According to Dr. Mendoza, who said he had indications of support from several friendly countries, a vote in favor of Honduras would mean that the countries so voting recognized the award of the King of Spain as binding while a vote in favor of the Nicaraguans would mean that it was not so recognized. It was pointed out that either the Council or the Foreign Ministers, were they, eventually convened, would not be restricted necessarily to a vote in favor of either Honduras or Nicaragua. There were any number of actions which they might take such as finding that there was no aggression, determining that inasmuch as the action reported was on a frontier under dispute they could not determine whether there had been an aggression or not, the problem should be referred to the ICJ, etc.

The Foreign Minister then told Mr. Holland that there was another related matter which he wished to report. This was the recent publication of a volume of maps by the OAS which showed in the map of Honduras the area under discussion to be in dispute and no definitive boundary. On the other hand, in a map of Nicaragua they showed a portion of that area within the determined boundaries of Nicaragua. He stated that this was the third time that the OAS had published maps of this nature which would tend to show the OAS as supporting Nicaraguan claims. Honduras had in each case protested to the OAS but without any results. Mr. Holland suggested that perhaps this was an error on the part of the publishers. The Foreign Minister replied that this was the statement made by the OAS but was obviously unconvinced in view of the repetitions. He said that Lozano felt so strongly on this subject that in the absence of satisfaction the Honduran Government might withdraw from the OAS. Mr. Holland suggested that the desirable course of action might be for the Honduran delegate on the OAS Council to bring the matter orally to the attention of the Council in an effort to obtain some correction.

Dr. Mendoza expressed his appreciation for Mr. Holland's courtesy in receiving him and giving him so much of his time. He also expressed his gratitude for Mr. Holland's willingness to approach the appropriate Nicaraguan authorities.

APPENDIX G

"HONDURAN-NICARAGUAN BOUNDARY DISPUTE", DEPARTMENT OF STATE MEMORANDUM, DATED 22 DECEMBER 1955

There are attached the documents left with Mr. Holland by Honduran Foreign Minister Mendoza when he called on Mr. Holland on December 19. The first is an Aide-Memoire which contains a request that the US Government ask the Nicaraguan authorities the significance of its having advised the Secretary General of the League of Nations on November 29, 1939, that it had ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice and that the instrument of ratification would follow. Incidentally, no instrument of ratification ever appears to have been transmitted. The second document entitled "Honduras and Nicaragua" is a lengthy treatise on developments relating to the obligations of Honduras and Nicaragua vis-à-vis the International Court of Justice. While there is no indication as to who may have written this second document, I assume from the remarks which the Foreign Minister made in his conversation under reference that it was Manley O. Hudson, former Professor of International Law at Harvard and former Justice of the International Court of Justice. The conclusion reached by the writer, whoever it may have been, is that he "would not be surprised if the Court should say that Nicaragua is not bound to submit to its jurisdiction".

APPENDIX H

"HONDURAN-NICARAGUAN BOUNDARY DISPUTE", DEPARTMENT OF STATE INSTRUCTION TO UNITED STATES EMBASSY IN NICARAGUA, DATED 12 JANUARY 1956

Reference is made to memoranda of conversations between Assistant Secretary Holland and Honduran Foreign Minister Esteban Mendoza dated December 19, 1955, and between Mr. Robert Newbegin and Nicaraguan Ambassador Guillermo Sevilla Sacasa dated December 21, 1955, on the subject of the Honduran-Nicaraguan border dispute. These memoranda indicate that Honduras is willing to submit the border question to the International Court of Justice provided mutually agreeable terms of reference can be found. The Honduran representatives have made it clear that Honduras would not be willing to submit the question of the validity of the decision rendered by the King of Spain in 1906 since they maintain there is no question but what the decision is valid. They do not wish to weaken their position by even suggesting that this is a matter for decision by the Court. At the same time, they recognize that the Court might well investigate the validity of the decision, and would perhaps inevitably do so, were the dispute to be referred on some other grounds. To this the Hondurans have no objection. As the Embassy is aware, when the matter was discussed with Ambassador Sevilla Sacasa the latter expressed his interest in reaching an amicable solution and stated that he would discuss the matter in Managua during his forthcoming visit there.

On his return Ambassador Sevilla Sacasa indicated that his Government was definitely interested in presenting the matter to the International Court on a basis which would not reflect on the dignity of either of the participants. He indicated further that a study was being made to ascertain if an appropriate basis could be found. In this connection the Embassy is referred to memoranda of conversations between Ambassador Sevilla Sacasa and Mr. Holland and Mr. Newbegin, respectively, dated January 5.

It is suggested that the Ambassador discuss this matter with the appropriate Nicaraguan officials if a suitable occasion arises. It should of course be made abundantly clear to the Nicaraguans that the action of this Government in bringing the Honduran views to the attention of the Nicaraguans is entirely informal, unofficial and implies no responsibility for a solution on the part of any of the three parties involved in these exploratory conversations.

The Department is interested in receiving an appraisal from the Embassy as to the degree of seriousness of the Nicaraguan interest in referring the dispute to the International Court of Justice. It would also be interested in learning whether the Nicaraguan Government is in fact making a study of possible terms of reference were the matter to be submitted to the Court.

APPENDIX I

"NICARAGUAN-HONDURAN BORDER DISPUTE", DESPATCH FROM UNITED STATES EMBASSY IN NICARAGUA TO DEPARTMENT OF STATE, DATED 24 JANUARY 1956

Nicaraguan officials have repeatedly maintained that Nicaragua wishes to settle the Nicaraguan-Honduran border dispute. Their good faith in making such statements is not questioned. The Department will recall from the Embassy's telegram No. 325 of May 28, 1955, that Dr. Oscar Sevilla Sacasa, the Foreign Minister, reaffirmed on May 27, 1955, Nicaragua's willingness to submit to the International Court of Justice the question of the undefined sector of the Nicaraguan-Honduran border.

The border from the Gulf of Fonseca eastward to Portillo de Teotecacinte was agreed upon by the two countries in 1900 and 1901 through the action of a mixed border Commission. The line accepted must be re-surveyed in those parts where the markers have disappeared. It has been along the agreed upon but unmarked sector of the border that the incidents referred to by Foreign Minister Mendoza on his recent trip to Washington have occurred. In Note No. 46 of September 12, 1955, the Nicaraguan Foreign Minister suggested that the two Governments concerned have their respective Ambassadors at Washington choose from a list of IAGS engineers one to assist a mixed Nicaraguan-Honduran Commission to replace or set up markers along the agreed upon sector of the border (Embassy's Despatch No. 153 of October 5, 1955).

In his Note of September 29, 1955 (Ambdes 155 of October 5, 1955), the Nicaraguan Foreign Minister suggested that the long-pending dispute over that sector of the border which has not been defined be settled by the union (fusión) of the Nicaraguan and Honduran Departments involved, thus eliminating entirely a common border in the disputed area and anticipating the much-talked-about Central American Union.

In his Note of January 12, 1956 (Tegucigalpa's despatch No. 352, of January 13, 1956, and Embassy despatch No. 295 of January 20, 1956), the Honduran Foreign Minister rejected the suggestion, but proposed that a Mixed Commission presided over by a United States engineer determine the border "*in accordance with the Award of the King of Spain*" (emphasis supplied). The Honduran Foreign Minister also referred to Cruta and other places north of the Rio Coco (known as Rio Segovia in Honduras) where Nicaraguan National Guard detachments are stationed, stating that since such places are in Honduran territory as defined by the Award of the King of Spain, Nicaragua is violating Honduran territory.

Honduras contends that the Award is a "perfect, binding and perpetual Treaty" and that the only question remaining is that of where the border runs under the Award. According to the Honduran Foreign Minister's repeated statements as reported by the Department and Tegucigalpa, Honduras cannot go to the International Court of Justice except on the basis that the Award is valid.

Nicaragua's position is that the Arbitral Award is null (Ambdes 78 of August 16, 1955). Consequently, it cannot accept the Honduran position of going to the International Court on the basis that it is valid. For Nicaragua, the dispute presently is not as to where the undefined border may lie but whether the Arbitral Award of the King of Spain is valid or null.

The present Nicaraguan and Honduran positions are irreconcilable. The Embassy would appreciate being informed by the Department whether it would be procedurally possible for Honduras to bring before the International Court the charge that Nicaragua is occupying Cruta and other places which the Award of the King of Spain defines as Honduran. Nicaragua could presumably then answer that the Award is null and Cruta and the other places mentioned are not in Honduran territory but in Nicaraguan territory. A clearcut issue could then be established before the International Court without any so-called loss of dignity by Honduras.

The border dispute presently has neither any considerable public interest nor political ramifications in Nicaragua. It could develop into a serious matter if there are repeated violations along the defined sector.

As for the undefined border, there is similarly no immediate or pressing problem unless Honduras creates one. Nicaragua has been for a long time and is now in *de facto* (Nicaragua considers it *de jure*) control of the territory which has been an integral part of Nicaragua.

In an informed discussion of the matter on January 21, 1956, President Somoza told the Ambassador that Nicaragua wished to settle the dispute and would take the matter to the International Court of Justice, to the President of the United States, or to any other suitable person or organization. He added that Nicaragua could never recognize the Award of the King of Spain as valid since the Award gave more to Honduras than the latter originally claimed, namely, the Rio Coco valley. He also noted that while Nicaragua might be willing to abandon its claim to 90 per cent of the entire area in dispute, Honduras is unwilling to give up anything, even maintaining its claim to the additional area granted it through the Award "by mistake" and to which it made no claim originally. He pointed out that the 90 per cent of the area to which Nicaragua might be willing to abandon claim, is where there are alleged oil deposits. President Somoza stressed that the natural border is from a line drawn west from Cruta to the Cordilleras which form the northern watershed of the Rio Coco and then along that watershed to Portillo de Teotecacinte. He indicated that Nicaragua would never give up the area south thereof. The Embassy considers that the Nicaraguan Government would defend by force Cruta and the other places in the Rio Coco valley where it has National Guard detachments.

While the Nicaraguan Government cannot accept the Honduran thesis that the Award of the King of Spain is valid and will maintain that it is null, as a practical matter there is no pressing reason for Nicaragua to take the matter to the International Court of Justice, although it is agreeable to doing so to determine whether or not the Award is valid or null. The official most familiar with the technical procedural phases of the matter is probably the Vice Foreign

Minister, Dr. Alejandro MONTIES Argüello, who is presently in Mexico attending the meeting of the Inter-American Juridical Committee.

For the Ambassador,
(Signed) [Illegible.]
Counsellor of the Embassy.

APPENDIX J

"Honduran-Nicaraguan Border Dispute", Department of State Memorandum of Conversation, Dated 20 February 1956

Participants: Ambassador Izaguirre of Honduras,
ARA — Assistant Secretary Henry F. Holland,
MID — Park F. Wollam, Honduran and Nicaraguan Desk.

Ambassador Izaguirre asked if the Department could report any progress with respect to the suggestions made here by Honduran Foreign Minister Mendoza when he discussed the border dispute with Mr. Holland on December 19, 1955. The Ambassador had been asked by the Foreign Minister to inquire on this subject.

Mr. Holland replied that the suggestions of Foreign Minister Mendoza had been passed on to Nicaraguan Ambassador Guillermo Sevilla Sacasa, who had appeared receptive to them. Sevilla Sacasa was personally to discuss the matter with the Nicaraguan Foreign Minister and President Somoza when he visited Nicaragua during the holidays. So far, the Department does not know the results of Sevilla Sacasa's conversations. Mr. Holland stated that the Department certainly has a continuing interest in promoting a settlement of the problem, and that only a few days before he had requested an additional informal approach to the Nicaraguan Government on the basis of the Honduran offers.

Ambassador Izaguirre said that he appreciated our interest. The general terms of the present Honduran thinking were then reviewed. Honduras, according to the Ambassador, is willing to take the dispute to the International Court of Justice if Nicaragua will accept the Court's jurisdiction. Honduras would claim that its territory is being illegally occupied (in contravention of the 1906 *laudo* of the King of Spain), and leave it to Nicaragua to defend its position. However, according to the Ambassador, Nicaragua would have to agree to the court procedure because it is not a party to the convention and is not obligated to appear.

Honduras would also welcome a suit by Nicaragua against Honduras on the same general grounds. Ambassador Izaguirre also pointed out that Ambassador Sevilla Sacasa is again in Managua. Before the latter's departure the two had discussed the matter on friendly terms. Ambassador Izaguirre had suggested to Ambassador Sevilla Sacasa that as an alternate means of resolving the situation, President Somoza authorize direct negotiation for a solution. Sevilla Sacasa was supposed to have taken this up with President Somoza.

Mr. Holland said that the Department would continue to use its informal good offices, but that we do not wish to do anything that would be counterproductive. The Department would suggest that our Embassy in Managua take advantage of Ambassador Sevilla Sacasa's presence there for a further discussion of the possibilities.

APPENDIX K

"HONDURAN-NICARAGUAN BOUNDARY DISPUTE", DEPARTMENT OF STATE MEMORANDUM OF CONVERSATION, DATED 21 DECEMBER 1955

Participants: Ambassador Sevilla Sacasa of Nicaragua,
MID — Mr. Newbegin,
Mr. Wollam.

In a conversation with Ambassador Seville Sacasa today, the Ambassador was informed that certain Honduran officials had been in touch with the Department with regard to the Honduran-Nicaraguan boundary dispute. We were all aware of this long-standing dispute and the difficulties involved in reaching a settlement and of the desirability that notwithstanding these difficulties, some solution be found. The Ambassador was informed that the Hondurans had been told that we would approach the appropriate Nicaraguan officials on a purely unofficial and informal basis without any responsibility attaching to the United States, Honduras or Nicaragua, with a view to ascertaining whether there was not some common ground which might provide the basis for a solution.

I told the Ambassador that the Hondurans felt that the best means of settling the dispute would be through reference to the International Court of Justice. The only reservation the Hondurans had in this connection was the question of terms of reference, namely the Hondurans did not wish to refer to the Court the question of whether or not the award of the King of Spain in 1906 was valid. They recognized that once the question was referred to the Court the matter of the award would undoubtedly be passed on by the Court and they had no objection to this. It was purely a matter of terms of reference. The Hondurans would not agree to submitting the case to the Court on the basis of merely determining the validity of the award. If they did this they felt that that act itself would indicate that they had some question of its validity while in fact they had none. They recognized at the same time that Nicaragua would wish the matter referred to the Court on exactly that basis since Nicaragua was maintaining that the award was null and void and that accordingly the boundary line was still a matter of dispute. The Hondurans had suggested that either Honduras or Nicaragua could make a complaint before the Court to the effect that the other was illegally occupying certain territory or some other grounds of complaint might be found. Alternatively, they could find some terms of reference on which they would both agree but which would require a decision by the Court. Reference was made to the fact that the matter had not been previously referred to the Court because Nicaragua had never agreed to submit to compulsory jurisdiction.

Ambassador Sevilla Sacasa indicated that an agreement between the two countries would have to be reached to overcome this difficulty.

Ambassador Sevilla Sacasa said he understood the Honduran position which was one which he would take himself were he a Honduran. He mentioned, however, his belief that there were special reasons why Honduras was bringing up the matter at this time. He felt that Foreign Minister Mendoza was anxious to make a name for himself and that the internal politics of Honduras required that strong action be taken on the boundary dispute. He mentioned that Nicaragua was not excited by the issue and it had merely responded to the last strongly worded Honduran note with firmness but nothing more. He made passing reference to the difficulty in which former Honduran Ambassador Valle found himself because he had made a casual press statement to the effect that the boundary problem was still "pending". This was contrary to the view of his Government which maintains that it is a settled matter — settled because of the award of the King of Spain. The Ambassador indicated that this might be a good time to bring the matter up inasmuch as there existed a commission in Nicaragua which had a Conservative representative named by Somoza after having been designated by Chamorro, the Conservative leader. If this commission handled the matter there would no longer be an internal political problem in Managua. In short, should Nicaragua lose the decision the Conservative Party would not be able to place the blame on President Somoza. I agreed with the Ambassador and pointed out that for similar reasons there should be no difficulty in Honduras since the present Government there was a coalition of the three Honduran parties.

Ambassador Sevilla Sacasa stated that he understood the situation thoroughly and the explanation of the manner in which the two Governments might be able to take the dispute to the Court. He said he would discuss the matter confidentially in Managua in the near future since he was leaving Washington for Nicaragua tomorrow. He indicated that he would support the idea that this was the time to get something done. He expressed his appreciation for the Department's action and its position in the matter and said that he was hopeful that an agreeable solution could be found.

* * *

Note: No mention was made to Sevilla Sacasa as to the identity of the Honduran officials who had approached the Department nor that Foreign Minister Mendoza had been in Washington incognito.

APPENDIX L

"NICARAGUAN-HONDURAN BORDER DISPUTE", DEPARTMENT OF STATE MEMORANDUM OF CONVERSATION, DATED 2 MARCH 1956

Participants: Ambassador Sevilla Sacasa of Nicaragua,
MID — Mr. Newbegin,
Mr. Wollam.

During the course of a call by Nicaraguan Ambassador Sevilla Sacasa, Mr. Newbegin asked the Ambassador if there had been any progress with respect to the settlement of the Nicaraguan-Honduran border dispute.

Ambassador Sevilla Sacasa said that he had discussed this matter at length with the Honduran Ambassador to the United States, Dr. Izaguirre, prior to Sevilla Sacasa's recent trip to Managua. He had also talked over the problem with the President and the Foreign Minister of Nicaragua. As a result he was authorized to conduct informally discussions with Ambassador Izaguirre here in Washington. This was the procedure requested by Ambassador Izaguirre who felt that he could negotiate directly with the Nicaraguans to their mutual advantage.

Ambassador Sevilla Sacasa also thought this was advantageous because talks could be conducted here in a friendly manner because of the mutual friendship and respect to the two Ambassadors. He pointed out confidentially that Honduran Foreign Minister Mendoza, while very capable, was somewhat difficult for the Nicaraguans to deal with on the border question.

There followed a general discussion on the conditions under which the Nicaraguans could undertake arbitration on settlement of the dispute. Ambassador Sevilla Sacasa said that Nicaragua would probably go to the International Court if summoned by Honduras. It was not feasible, however, for Nicaragua to summon Honduras to the Court. There is some doubt as to whether Nicaragua would be officially obligated to submit to the International Court because an instrument of ratification of acceptance of the Court's jurisdiction was never sent, although in 1939 a telegram was sent by the Nicaraguan Foreign Minister giving informal acceptance.

Ambassador Sevilla Sacasa said that Nicaragua would probably agree to settlement of the dispute by the ICJ since the ICJ had probably the most prestige and tradition in such cases. There are other means, however, that Nicaragua might agree to. These would include arbitration by a prominent person on a mutually agreed on commission.

The Ambassador said that he was going to explore all the proposals in a series of informal talks with Ambassador Izaguirre. It was his idea to move slowly and surely and to avoid any precipitous action that might prejudice settlement of the dispute. He said he would keep the Department informed of developments.

(*Note:* It seemed from the sum total of the Ambassador's comments that while Nicaragua would like to have the quarrel settled, there is no intention to move as rapidly as the Hondurans would like and that there is still a basic disagreement on the terms under which the countries would submit to arbitration.)

APPENDIX M

"REVIVAL OF HONDURAN-NICARAGUAN BORDER CONTROVERSY", DESPATCH FROM UNITED STATES EMBASSY IN NICARAGUA TO DEPARTMENT OF STATE, DATED 31 DECEMBER 1956

Interest in the Honduran-Nicaraguan border dispute, which is a recurrent phenomenon in Honduras, was given a marked revival in the Honduran press on the occasion of the 50th anniversary of the "Laudo" — the decision on the line of the demarcation made by the King of Spain on December 23, 1906.

Ten days before the anniversary, the subject came up in connection with Foreign Minister Esteban MENDOZA's trip to the United States. *El Cronista* of December 13 speculated that Mendoza and Dr. Céle o DAVILA would go on from the United States to The Hague to ask the International Court of Justice for a final decision on the merits of the "Laudo".

On December 18th, the first of a number of obviously planned articles and advertisements began to appear in the press. On that day, *El Dia* noted the forthcoming 50th anniversary of the "Laudo", praised its justice, and asserted its definitiveness. On that date, *El Dia* began devoting part of page four to a daily series of reprints of documents concerned with the border dispute and the "Laudo".

On December 20th, the first of the giant editions with which the Honduran press celebrated Christmas began to appear, affording more space for the presentation of material on the "Laudo". The December 20th Christmas edition of *El Dia* carried a half-page ad from the Foreign Ministry which presented the line that the entire campaign took. Noting the 50th anniversary of the "Laudo", which the Honduran Government supported even though the ruling was unfavorable to the Honduran thesis — i.e., Honduras did not get all that it asked for — it called on Hondurans to be alert and united, without partisan differences, because "soon we will have to look for the civilized means of putting (the Laudo) into effect". The ad also carried seasonal greetings.

The December 21 Christmas issue of *El Cronista* contained a full-page ad with a plea, signed by Mendoza, for unity and good spirit in helping Honduras on its way to its prime objectives, Peace and National Union. Half the ad consisted of a map which appeared in the same form whenever a map was used to illustrate the Laudo, one which the Foreign Ministry had used in a pamphlet on the Laudo in May, 1956.

In part of its full-page ad in the Christmas issue of *La Epoca*, the Foreign Ministry called on Hondurans to remember the anniversary of the Laudo. In the same edition, a two-page spread presented the documentation on the Laudo, including diplomatic correspondence of that period indicating both United States and Nicaraguan recognition of the Laudo.

The heads used by *La Epoca* to describe the United States correspondence were used verbatim when this material was reprinted as part of a spread on the Laudo printed in the *Diario Nacional* of December 21, being a further indication that most or all of the editorial work came from the same source. The spread in *Diario Nacional*, which was carried on the editorial page, included a manifesto addressed by the Society of Lawyers of Honduras to the peoples of the American continent and their legal bodies, supporting the Laudo and calling for it to be put into effect.

The December 22 *Prensa Libre* began the return to more original coverage of the border question by announcing under the banner headline "Redeem the Cruta" that Foreign Minister Mendoza had retained a noted international lawyer (not named — but understood to be Manley HUDSON —) to argue the case of Honduras at The Hague. An editorial affirmed the support of the Reformistas for the Laudo at all costs.

The press dropped the subject for some days, but it was revived in an article in *El Cronista* of December 27 which announced that the sad truth about the Laudo issue was that the people of the Mosquitia leaned more toward Nicaragua than toward Honduras because it has been the Nicaraguans who have explored, developed and settled the country to the extent that this has been done at all.

Prensa Libre of the same date gave considerable inside coverage to a series of documents illustrating the consistent Honduran view that the Laudo was legal and irrevocable.

It should be noted that not all of the press has covered the issue — nothing has appeared in *El Pueblo* — and that the issue has not been left to the press alone, inasmuch as the Foreign Ministry has circulated a large card printed with a map of Honduras on one side, showing the line decreed in the Laudo and carrying on the other side the operative clause of the Laudo.

Further official interest in the boundary issue was indicated by the recent appointment of Lt. Colonel Héctor CHINCHILLA, a non-flying Air Force officer, to direct a military economic development program in the Mosquitia. As yet, no funds have been given him with which to do this.

Apart from any effort in the direction of assuring itself of physical possession of the disputed area, the main interest of the Hondurans at present seems to be the establishment of the legality of the Laudo. It was for this reason that Mr. Hudson was retained. It might be noted that there is a section of the Honduran-Nicaraguan border which is not in dispute (from Tocecacinta westward to the coast) and which is being surveyed by a Joint Border Commission. A neutral member of the Joint Commission is an American, Mr. Robert R. McIllwaine, a civilian employee of the United States Army assigned to the IAGS. Mr. McIllwaine has the deciding vote when the Honduran and Nicaraguan members are split and seems to have done his part to the satisfaction of all. In a conversation with an Embassy officer, Foreign Ministry Sub-Secretary Alejandre ALFARO Arriaga indicated that, should an agreement between the two Governments be possible, it would be desirable to have the functions of the present Joint Commission extended to cover the boundary to the east coast.

For the Chargé d'Affaires a.i.,
(Signed) Jack FRIEDMAN,
Second Secretary of Embassy.

APPENDIX N

TELEGRAM FROM UNITED STATES EMBASSY IN HONDURAS TO DEPARTMENT OF STATE, DATED 5 MARCH 1957, REPEATED WITH CORRECTIONS, 8 MARCH 1957

(Telegram)

As per instructions have discussed Honduras-Nicaragua relations arising out of creation of new department with Foreign Minister, Junta member Galvez and Counselor of State Agurcia. Taken at face value result is gratifying and situation not nearly as critical as might otherwise appear. Honduran activities center on two considerations: First, in addition to other attempts ever since April 1956 Honduras attempting to get Nicaragua appear before International Court or other neutral body to settle boundary problem and note of April 1956 suggesting International Court never to date been acknowledged. Thus Honduras hoping by this action as primary and peaceful objective to stimulate Nicaragua to either arbitrate or bilateral negotiation. Secondly, timing of this activity as previously reported directed to creating peaceful internal Honduran climate for Junta in order to further their objective of announcing and obtaining popular approval for a plan to return to constitutionality.

Foreign Minister has assured me specifically *(a)* that orders to troops are not to engage in hostilities. Galvez added to this "unless attacked".

(b) Area of operations of Honduran troops at least 150 kilometers from Cruta and more than 100 kilometers from nearest alleged Nicaraguan base.

(c) Reason for sending troops as distinguished from purely civilian settlers is territory wild, inhabited by ignorant tribes therefore desired disciplined personnel capable of sustaining themselves in field and least calculated to cause incidents with indigenous inhabitants, i.e., rather same situation as prevailed once in our wild west.

(d) Junta now has before it for issuance note replying to Nicaragua protest

which Foreign Minister and Galvez characterized as conciliatory which reviews history of Honduran peaceful attempts settle dispute.

Foregoing Hondurans still believe that no trouble will result.

Embassy strongly recommends continued processing of Smathers amendment loan having in mind could ultimately be vetoed at last minute if Department so desires for reasons pointed out in its cable. Otherwise fear that administrative delays will delay beyond April 30 deadline allocation funds. In this connection Embassy has strongly in mind purpose of loans to encourage civilian form government as distinguished from military dictatorship, and further in mind that with this military supported move in new department, military becoming stronger in popular and their own eyes.

(Signed) WILLAUER.

(Telegram)

By way of correction drs explanation so far as is now known there has never been any formal offer in recent times by Honduras to go to ICJ but during early months of 1956 Foreign Minister informed Ambassador this was ultimate Honduran intention and that he had so advised Nicaraguan Foreign Minister at meeting in Cuba during Batista inauguration. Reference in cable to "note of April 1956" erroneously described due to telescoping of information by Foreign Minister. Note actually intended to be referred to was January 12, 1956, still unanswered in which Honduras simply offered to create mixed commission to physically delimit Laudo award. At time Foreign Minister Mendoza explained this was opening gambit which he expected to be refused but would set stage for next step of going to ICJ when and if refusal received. I am trying today to smoke out Honduran authorities further on possibility of some way of getting to ICJ now that Honduras clearly unwilling enter bilateral negotiations on basis acceptable Nicaragua, i.e., possible ceding of territories beyond Laudo, or Odeca arbitration, which comes to same thing in their view.

(Signed) WILLAUER.

APPENDIX O

"HONDURAS OFFERS TO SUBMIT DIFFERENCES WITH NICARAGUA TO INTERNATIONAL COURT OF JUSTICE", DESPATCH FROM UNITED STATES EMBASSY IN HONDURAS TO DEPARTMENT OF STATE, DATED 19 MARCH 1957, ENCLOSING NOTE FROM THE MINISTER OF FOREIGN RELATIONS OF HONDURAS TO THE MINISTERS OF FOREIGN AFFAIRS OF THE AMERICAS AND SPAIN, DATED 15 MARCH 1957

There is enclosed the Spanish text[1] and English translation of the Honduran note expressing willingness to submit to the International Court of Justice its differences with Nicaragua. The Honduran Government has sent copies of this note to all American chanceries, as well as that of Spain, the United Nations, Organization of American States, ODECA, and the International Court.

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[1] Not reproduced.

For the Ambassador,
(Signed) Jack FRIEDMAN,
Second Secretary of Embassy.

Department of State, Division of Language Services

(Translation)

LS No. 113628
BP
Spanish.

MINISTRY OF FOREIGN AFFAIRS OF THE REPUBLIC OF HONDURAS

(Telegram)

Tegucigalpa, D.C. 15 March, 1957.

To the Ministers of Foreign Affairs of the Americas and Spain

I have the honor to advise Your Excellencies that the Ministry of Foreign Affairs will soon transmit a full statement of the legal bases of the rejection by the Government of Honduras of the position taken by the Government of Nicaragua contesting improperly the Award of His Majesty the King of Spain of December 23, 1906, and of the insistence by Honduras upon execution of that arbitral Award, which fixed the boundaries between Honduras and Nicaragua from the Portillo de Teotecacinte to the mouth of the Segovia River, as the only legitimate solution to the matter in accordance with international law.

In response to the recent creation by my Government of the Department of Gracias a Dios with its eastern boundary the Coco or Segovia River, the Government of Nicaragua filed a protest alleging that the new Department encompassed some Nicaraguan territory and some territory said to be in dispute and assuming once again the antijudicial position of refusing to recognize the Award without ever having recourse to a competent international tribunal to justify such refusal. My Government rejected the protest, considering it baseless.

Pursuant to the Charter and recommendations of the United Nations, the Republic of Honduras not only has submitted to the compulsory jurisdiction of the International Court of Justice but also is willing to submit for the Court's decision disputes which, as in the present case, are not amenable to solution through the peaceful means recognized by international law or established by international treaties. The Republic of Nicaragua, in contrast, when it signed the Pact of Bogotá in 1948, entered an express reservation as to the peaceful settlement provided by that inter-American treaty with respect to arbitral awards whose validity it had contested.

I am sending this same message to the foreign ministries of all American States and Spain, as well as to the Secretariats of the Organization of American States, the Organization of Central American States, and the International Court of Justice.

I take this opportunity to renew to Your Excellency the assurances of my highest consideration.

Minister of Foreign Relations of Honduras.

cc: Secretary of State, Washington, D.C., U.S.A.
Foreign ministries of all American States
Ministry of Foreign Affairs, Madrid, Spain
Secretariat of the United Nations, New York, U.S.A.
Secretariat of the Organization of American States, Washington, D.C., U.S.A.
Secretariat of the Organization of Central American States, San Salvador, El Salvador
Secretariat of the International Court of Justice, The Hague, The Netherlands.

To the Ministers for Foreign Affairs of the Americas and Spain

This Chancery has the honor to advise Your Excellency that a complete statement will be sent in the near future regarding the juridical reasons on which the Government of Honduras bases its rejection of the position of the Government of Nicaragua which rejects out of hand the December 23, 1906, Award of His Majesty the King of Spain; and on which it bases its insistence that the execution of said Arbitral Award, which fixed the boundaries between Honduras and Nicaragua from Teotecacinte Passage to the mouth of the Segovia River, is the only legitimate solution to the matter in accordance with International Law. Because of the recent creation by my Government of Gracias a Dios Department, fixing as its eastern boundary the Coco or Segovia River, the Government of Nicaragua made a protest alleging that the new Department embraces a part of Nicaraguan territory and part of the territory alleged to be in litigation, again assuming the same anti-juridical position of non-recognition of said Award without having ever had recourse to a competent international court to justify its refusal to comply. My Government rejected the protest, considering the same without foundation. In observance of the Charter and recommendations of the United Nations, the Republic of Honduras not only has submitted to the compulsory jurisdiction of the International Court of Justice but is also willing to submit to its decision those differences which, as in the present case, it might have with another State or States that are not susceptible to solution through peaceful means as recognized by International Law or consecrated by International Treaties. The Republic of Nicaragua, on the other hand, in signing the Bogotá Pact of 1946 expressly reserved its right as to the peaceful solutions contemplated by said American Treaty insofar as Arbitral Sentences the validity of which it might have impugned. I am sending this message to all the American Chanceries, to the Secretariat of the Organization of American States and to the Secretariat of the International Court of Justice. I avail myself of this opportunity to reiterate to Your Excellency the assurances of my highest consideration. Minister for Foreign Affairs.

Copy to: Secretary of State, Washington, D.C., U.S.A. Chanceries of the Americas. Minister for Foreign Affairs, Madrid, Spain. Secretariat of the United Nations, New York, U.S.A. Secretariat of the Organisation of American States, Washington, D.C., U.S.A. Secretariat of the Organization of Central American States, San Salvador, El Salvador. Secretariat of the International Court of Justice, The Hague, Holland.

APPENDIX P

DESPATCH FROM UNITED STATES EMBASSY IN HONDURAS TO DEPARTMENT OF STATE, DATED 21 MARCH 1957, ENCLOSING NOTE FROM MINISTER OF FOREIGN AFFAIRS OF NICARAGUA TO MINISTER OF FOREIGN AFFAIRS OF HONDURAS, DATED 19 MARCH 1957, AND AN ARTICLE FROM *EL DIA*, 20 MARCH 1957[1]

There is enclosed the Spanish text[2] and English translation of the pertinent part of the Nicaraguan Foreign Ministry's note to Honduras of March 19, 1957, replying to a circular radiogram sent March 15 by the Honduran Foreign Ministry to American chanceries, the Spanish chancery, and the secretariats of the UN, OAS, ODECA, and the International Court of Justice. In its note, Honduras declared that it was willing to submit differences such as its present one with Nicaragua to the International Court of Justice, declaring, however, that the execution of the 1906 Laudo of the King of Spain was the only possible legitimate solution.

The Nicaraguan note, addressed to all the recipients of the Honduran note with the exception of the UN, affirms its continued willingness to accept a peaceful means of solving its differences with Honduras, declares its belief in the nullity of the Laudo — though asserting that Honduras is the one that should go to the Court — and announces that a note will soon be sent embodying Nicaragua's position on this point.

For the Ambassador:
(Signed) Jack FRIEDMAN,
Second Secretary of Embassy.

Department of State, Division of Language Services

(Translation)

LS No. 113593
FA/BP
Spanish.

[From *El Dia*, March 20, 1957]

[NICARAGUA] PERSISTS IN REJECTING THE VALIDITY OF DECEMBER 1906 ARBITRAL AWARD

Advises our Foreign Ministry that It Will Soon Send New Note Explaining Absurd Pretensions

Ministry of Foreign Affairs
of the Republic of Honduras

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[1] Not reproduced.

[2] Not reproduced.

Managua, Nicaragua,
19 March 1957.

No. 378

His Excellency
Doctor Jorge Fidel Duron,
Minister of Foreign Affairs
Tegucigalpa.

[Excellency:]

I am pleased to acknowledge receipt of Your Excellency's message of yesterday's date in which you advise me that you will transmit in the near future a complete explanation of the legal reasons upon which the Government of Honduras bases its rejection of the position of my Government contesting the Award of His Majesty the King of Spain of 23 December 1906 and its insistence that execution of that arbitral award is the only solution of the matter.

Your Excellency adds that on the occasion of the recent creation by your Government of the Department of Gracias a Dios, my Government protested, adopting the same position — which Your Excellency characterizes as anti-judicial — of refusing to recognize the award without ever having applied to a competent international tribunal to justify its position, and that your Government rejected the protest, considering it to be without foundation. Your Excellency goes on to say that the Republic of Honduras has not only accepted the compulsory jurisdiction of the International Court of Justice but is willing to submit to the Court for decision those disputes, like the present one, which it may have with one or more States and which may be susceptible of resolution by the peaceful means recognized by international law or established in international treaties. Further, that the Republic of Nicaragua, in signing the Pact of Bogotá in 1948, made a specific reservation regarding the pacific settlement contemplated by that American treaty with respect to arbitral awards whose validity it had contested. Your Excellency concludes by saying that you are sending the same message to the foreign ministries of all the American States and that of Spain, as well as to the Secretariat of the Organization of American States and the Secretariat of the International Court of Justice.

In reply, I am pleased to inform Your Excellency that my Government appreciates notice of the forthcoming explanation which Your Excellency will make and has taken note of your statement with respect to the submission to the International Court of Justice of your disputes with other States. My Government cannot accept the assertion that the only solution to the matter in conformity with international law is execution of the arbitral award, as that would amount to a resolution of the principal question, which is the determination of the nullity or validity of the award.

I also wish to inform you, reiterating the statements made in this respect during the mediations of 1918 and 1937 and in numerous exchanges of notes between our foreign ministries, that the Government of Nicaragua has been and is at all times disposed to resolve the question of the boundary between our two countries by the peaceful means established by international law, while the Government of Honduras has asserted that there is no boundary issue and has refused even to discuss the validity of the Award of His Majesty the King of Spain. I can cite, among others, the notes of the Honduran Foreign Ministry of 11 June 1955 and 12 January 1956 which contain such a refusal. Consequently, my Government can never be blamed for the failure to resolve the border question, as there is and always has been willingness on its part to resolve it.

I also take the liberty of advising you that the reservation made by Nicaragua to the Pact of Bogotá is not, as Your Excellency asserts, a reservation with respect to the peaceful solution which that Pact contemplates in relation to arbitral awards whose validity it might contest; it is rather a reservation [stating] that no provision of that Pact may be interpreted as an acceptance by Nicaragua of arbital awards it has contested. So firm and constant has the policy of my Government been to resolve by peaceful means its differences with other countries that in the first regular meeting of the Ministers of Foreign Affairs of Central America, held in Antigua in August 1955, it proposed a draft [resolution] for peaceful settlement of conflicts among Central American countries which is still awaiting approval. The fact that Nicaragua has not applied to any international tribunal to contest the award can in no case be interpreted as supporting the position taken by your Government, for, on the contrary, it would be incumbent upon your Government to have recourse to such a tribunal.

I do not believe it inopportune to state that my Government maintains its invariable position that the royal award of 23 December 1906 is null; and, although your Government is already familiar with the legal position which Nicaragua has traditionally put forward, I advise you that a note will soon be sent explaining the reasons on which are based our assertion that the royal award is null. Nicaragua has never accepted the award and its challenge cannot therefore be described as extemporaneous.

I take the liberty of stating that I am sending this same message to all the foreign ministries of the Americas and that of Spain, as well as to the Secretariats of the Organization of American States, of the Organization of Central American States, and of the International Court of Justice. I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

(Signed) Alejandro MONTIEL ARGÜELLO,
Minister of Foreign Affairs.

Draft Translation of Pertinent Section of Nicaraguan Note of March 19, 1957 (following recapitulation of Honduran note of March 15, 1957):

. . . In reply I am happy to inform Your Excellency that my Government appreciates notice of the forthcoming statement which Your Excellency will make and has taken note of your statement with respect to submission to the International Court of Justice of your differences with other nations. My Government cannot accept the assertion that the only solution of the matter in accordance with International Law is the execution of the arbitral sentence since this would be equivalent to resolving, in a sense, the principal question, which is the determination of the nullity or validity of the Award. Also, I am pleased to state to you, reiterating statements made in that sense during the mediations of 1918 and 1937 and in numerous notes exchanged between our Chanceries, that the Government of Nicaragua has been and is at all times disposed to resolve the matter of boundaries between our two countries by those peaceful means consecrated by International Law, whereas it has been the Government of Honduras which has maintained that there does not exist a question of boundaries and has refused even to discuss the validity of the Award of His Majesty the

King of Spain, to that effect mention being made, among others, of the note of that Chancery dated June 11, 1955, and January 12, 1956, containing said refusal. In consequence of the foregoing my Government can never be blamed for the lack of a solution of this matter of boundaries, since there is and always has been good will on its part to resolve it. I also take the liberty of advising you that the reservation of Nicaragua to the Bogotá Treaty does not mean, as Your Excellency states, a reservation insofar as concerns peaceful solutions as contemplated by said Pact in relation to arbitral sentences the validity of which it might have impugned, but rather a reservation that no ruling in that Pact may be interpreted as acceptance on the part of Nicaragua of those arbitral sentences it may have impugned. The policy of my Government has been so firm and constant insofar as peacefully solving its differences with other countries, that at the first regular meeting of Ministers for Foreign Affairs of Central America held at Antigua in August 1955 it proposed a resolution for the peaceful solution of conflicts among Central American countries which is still pending. The fact that Nicaragua to date has not gone to an International Court to impugn the Award cannot in any case be interpreted in favor of the thesis maintained by your government since it is your country which should take recourse to said Court. I do not consider it inopportune to state to you that my Government maintains its invariable position on the nullity of the Royal Award of December 23, 1906, and, although your government is already aware of the juridical thesis traditionally maintained by Nicaragua, I advise you that a note will soon be sent to you giving the fundamental reasons on which Nicaragua bases its allegation of nullity of the Royal Award which has never been accepted by Nicaragua, it not being possible, therefore, to describe as out of hand its impugnment of same. I take the liberty of stating to you that I am sending this same message to all the American Chanceries and to that of Spain, and to the Secretariats of the Organization of American States, of the Organization of Central American States, to the International Court of Justice. I avail myself of this opportunity to reiterate to Your Excellency the assurances of my highest and most distinguished consideration. Alejandro MONTIEL ARGÜELLO. — Minister for Foreign Affairs.

APPENDIX Q

"COURTESY CALL ON HONDURAN AMBASSADOR", DEPARTMENT OF STATE MEMORANDUM OF CONVERSATION, 20 MAY 1957

Participants: Ambassador Villeda Morales — Honduras,
MID — Mr. Wieland,
Mr. Warner.

During a courtesy call by Mr. Wieland, accompanied by Mr. Warner, the Ambassador expressed his gratification at the excellent work of the OAS Investigating Committee. He is holding a reception for that Committee on Thursday, May 23, as an indication of his high regard. He observed that in the

COAS deliberations on the Honduran/Nicaraguan dispute, feeling has not run nearly so high as during Nicaragua's dispute with Costa Rica and the Ambassador said that he is personally friendly with Sevilla Sacasa. The Ambassador believes the dispute with Nicaragua should go before the International Court of Justice and he said that Honduras is looking for three international lawyers to help put on the case; he mentioned Dr. Manley Hudson. He also noted that Honduras would be in a better position to present its case before the ICJ if Honduras had a legally constituted government and had reverted to constitutional order.

The Ambassador mentioned that a recent notice in the Washington papers about his impending return to Honduras was incorrect. He stated he does plan to return to Honduras and be a candidate for the constituent assembly when elections are announced but he gave the impression that he is not planning to return before then.

The Ambassador referred to the recent meeting in Lima, Peru of the Third Continental Congress Against Soviet Intervention in Latin America (April 10-14, 1957). He said that Honduras had sent a good delegation to that meeting including Roberto Martinez of the Liberal Party and Raul Edgardo Estrada representing Honduran labor. Villeda himself sent a message to the conference and promised to furnish a copy of it to Mr. Wieland. A discussion followed of the dangers of Communist activity in Latin America.

The Ambassador mentioned that he has received a letter indicating that the wife of Dr. Zoilo Valle of Tegucigalpa is trying to obtain a visa to attend her daughter's graduation from Holy Cross Academy. He is under the impression that Mrs. Valle is having some difficulties. Mr. Warner promised to look into this.

APPENDIX R

"NICARAGUAN-HONDURAN BORDER SITUATION", DEPARTMENT OF STATE MEMORANDUM OF CONVERSATION, DATED 27 MAY 1957

Participants: Ambassador Sevilla Sacasa of Nicaragua,
ARA — Mr. Rubottom,
MID — Mr. Wollam.

Ambassador Guillermo Sevilla Sacasa of Nicaragua called to pay his respects to Mr. Rubottom upon the former's return from a brief visit to Nicaragua. He had spent a few days in Managua in order to inform the President of developments in Washington on the Nicaragua-Honduran border dispute and to obtain instructions from his President.

Ambassador Sevilla Sacasa stated that the Nicaraguan delegation to the Antigua meeting would be composed of representatives of all political parties. In addition to the government members, prominent, respected and well-informed persons from the Conservative and Independent Liberal Parties would also be in attendance.

The Ambassador voiced the opinion that Honduras would approach the meeting with only one solution to the border problem which would be the affirmation of the validity of the Laudo of the King of Spain. Nicaragua, however, has a more flexible position and is preparing to submit several plans for the consideration of the Central American Foreign Ministers. If the first plan is rejected, the Nicaraguan delegation will come forth with others to indicate their willingness to arbitrate.

The Ambassador stated that many persons mentioned only the International Court of Justice as a means for solving the problem. Nicaragua feels, however, that there are a number of methods that must first be tried prior to any submission to the Court. This further effort would be "required" by the Inter-American system, according to the Ambassador. If the Foreign Ministers' meeting at Antigua does not resolve anything, the Government of Nicaragua is prepared to initiate other steps such as submission to various American authorities or to the United States for settlement. The Ambassador also intimated that he was working on various approaches to the problem here in Washington and that these would be revealed at the proper time, if necessary.

Nicaragua is not afraid to take the case to the ICJ according to the Ambassador and it is possible that it might lose the case, in which case, it would give up gracefully. However, said the Ambassador, it will be clearly pointed out to the Hondurans that they could also lose the case and he implied that Honduras would not accept this kind of judgment.

As a final recourse, Nicaragua would appeal under the Pact of Bogotá for submission of the dispute to the ICJ; but the Ambassador left some doubt as to what terms of reference might be suitable for both parties.

Ambassador Sevilla Sacasa also stated that the three neutral Central American governments would probably bring up the idea of making at least part of the disputed area into a neutral Central American zone to be the future capital of a unified Central America. Sevilla Sacasa thought that this was particularly stimulated by the Salvadorans who are cramped for space and who will require an outlet for their people and for their investment capital. He did not think that this idea would bring any fruitful results.

Mr. Rubottom thanked the Ambassador for his expression of the Nicaraguan views and said that there were two things in his opinion which were important at this time. The first was that there not be any undue delay in the efforts of both countries to reach a definitive settlement of the boundary question. While the matter should not be rushed, it is most important not to lose the present momentum. The second important point is that both sides act in good faith to prevent any future flare-up in the disputed zone. In this connection, it is imperative that both sides remove their troops from the disputed points, where there is always a possibility of conflict.

Ambassador Sevilla Sacasa said that he was in complete agreement with this and he thought that the details with respect to Mocoron and other frontier points could be arranged.

Comment:

The Ambassador appeared to confirm the impression that Nicaragua is going to use a variety of delaying tactics before presenting the case to the ICJ.

APPENDIX 8

TELEGRAM FROM DEPARTMENT OF STATE TO UNITED STATES EMBASSIES IN NICARAGUA AND HONDURAS, 10 JUNE 1957

(Telegram)

OAS Ad Hoc Committee has informally proposed to Ambassadors Honduras Nicaragua Washington three alternative formulas for settlement boundary question, all based on Pact of Bogotá, namely referral question to: *(a)* special ad hoc arbitral tribunal established as provided Chapter V Pact of Bogotá; *(b)* sole arbiter selected by agreement; *(c)* International Court of Justice. Under *(a)* and *(b)* tribunal or arbiter would have authority settle any aspects problem left unresolved by initial consideration of legal issue. Under *(c)* any outstanding questions would be referred to arbitration under Pact of Bogotá. Failure either side comply with decision would call for Meeting Foreign Ministers OAS in accordance Pact of Bogotá. Committee inclined favor plan *(a)* as most expeditious and appropriate, but wishes governments select procedure they consider preferable.

In submitting case under any of three alternatives Committee understands, but has not put in writing, that Honduras would merely request enforcement 1906 Award while Nicaragua would contend Award invalid.

If consulted Embassy should encourage government reach agreement with Committee on one of above formulas.

Annex 35

Letter from the Registrar of the Court to Judge Hudson, Dated 2 September 1955 (from Judge Hudson's Papers on Deposit in the Manuscript Division of the Harvard Law School Library)

Dear Manley,

In reply to your enquiries relating to the position in respect of acceptance of the compulsory jurisdiction of the Court by Honduras and Nicaragua, I can tell you that the position with regard to the former is clear, although the matter is more complicated with regard to the latter.

By a Declaration dated February 2nd, 1948, deposited on February 10th, 1948, Honduras accepted the compulsory jurisdiction of the Court for a period of six years. I enclose a copy of the Declaration in the English translation[1] made by the Secretariat of the United Nations. The original was in Spanish. By a further Declaration, dated April 19th, 1954, and deposited with the Secretary-General on May 24th, 1954, the Government of Honduras renewed the acceptance by that State of the compulsory jurisdiction of the Court for a further period of six years, as from May 24th, 1954, automatically renewable in the absence of notice of termination.

So far as Nicaragua is concerned, the position is more obscure. Nicaragua had signed but not ratified the Protocol of Signature of the Court's Statute when, on September 24th, 1929, it accepted the optional clause concerning the Court's compulsory jurisdiction, making the Declaration set out in the Yearbook for 1946-1947, to which you have referred, on page 210. It would appear that the source of the footnote which you quote, relating to Nicaragua's ratification of the Protocol of Signature of the Statute of the Permanent Court, was the Sixteenth Report, covering the period June 15th, 1939, to December 31st, 1945, published by the Registry of the Permanent Court (Series E, No. 16). Page 331 of that volume gives the following note:

> "Protocol of Signature of the Statute of the Court.
> Geneva, December 16th, 1920.
>
> According to a telegram dated November 29th, 1939, addressed to the League of Nations, Nicaragua had ratified the Protocol, and the instrument of ratification was to follow. The latter however has not yet been deposited."

We have hunted through our archives here, but I regret to say that our records have failed to reveal the source of the entry in the last Annual Report of the Permanent Court. Previous Annual Reports indicated that Nicaragua had signed the optional clause but was not bound thereby by reason of its failure to ratify the Protocol of Signature of the Statute, which would appear to be correct. The entry which you mention in Volume 88 of the League of Nations Treaty Series must apparently refer to the signature of the optional clause. You have yourself criticized the confusion which reigned at the time of the drafting of the Protocol of Signature of the Statute, and this confusion appears to have persisted throughout the years. I find, for instance, in a League of Nations Official Journal publication of 1944, dealing with signatures, ratifications and accessions in respect of agreements and conventions concluded under the auspices of the League of Nations, under the heading "Optional clause recognizing the Court's compulsory jurisdiction" that Nicaragua's unconditional acceptance is referred to under a sub-heading "Signatures not yet perfected by ratification". Since by the terms of the Declaration of acceptance of the compulsory jurisdiction no ratification was necessary, the failure by Nicaragua to ratify must relate to the Protocol of Signature of the Statute. If, however, Nicaragua had indeed ratified the Protocol in 1939, the 1944 entry would appear to be incorrect.

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[1] Not submitted.

As you point out, our Yearbook for 1947-1948 and subsequent Yearbooks have contained a reference to Nicaragua's Declaration of 1929, without indicating that it may be of no effect, except in so far as the latest Yearbooks have all contained a reference to page 210 of the 1946-1947 Yearbook, which sets out the note which you have quoted. It may well be that this is somewhat misleading. For what this is worth, this has never elicited any comment from Nicaragua. It seems to me that the simplest way in which the true position can be ascertained is by consultation of the League of Nations archives, and we are accordingly writing to Geneva.

I do not think one could disagree with the view you express when you say that it would be difficult to regard Nicaragua's ratification of the Charter of the United Nations as affecting that State's acceptance of the compulsory jurisdiction. If the Declaration of September 24th, 1929, was in fact ineffective by reason of failure to ratify the Protocol of Signature, I think it is impossible to say that Nicaragua's ratification of the Charter could make it effective and therefore bring into play Article 36, paragraph 5, of the Statute of the present Court.

(Signed) J. LÓPEZ-OLIVÁN.

Annex 36

LETTER FROM THE DEPUTY-REGISTRAR OF THE COURT TO JUDGE HUDSON, DATED 28 SEPTEMBER 1955, ENCLOSING A LETTER FROM MR. PELT, DIRECTOR, EUROPEAN OFFICE OF THE UNITED NATIONS, TO THE REGISTRAR OF THE COURT, DATED 14 SEPTEMBER 1955 (FROM JUDGE HUDSON'S PAPERS ON DEPOSIT IN THE MANUSCRIPT DIVISION OF THE HARVARD LAW SCHOOL LIBRARY)

Dear Manley,

I refer to our letter of September 2nd which dealt *inter alia* with the question which you had raised concerning the position of Nicaragua in respect of acceptance of the compulsory jurisdiction of this Court. We then indicated that we were writing to Geneva to see whether any fresh light might be thrown on the problem by consultation of the League of Nations archives.

We have now heard from Mr. Pelt and at the request of Julio I am sending you herewith a copy of his letter which, it seems to me, completely answers the question which you had raised.

(Signed) J. GARNIER-COIGNET.

Dear Mr. López-Oliván,

I had your letter of September 5th concerning the question that has arisen with regard to Nicaragua's position in respect of the acceptance of the compulsory jurisdiction of the International Court of Justice.

Upon receipt of your letter I had the relevant League file, as well as the relevant U.N. file, brought up to my office for perusal. I also ordered a search through the collection of instruments of ratification dating from League days which we still hold in a special safe in our archives.

The inspection of the files shows that U.N. file No. G/IV-1/3-3077, which starts towards the end of 1947 and is right up to date does not contain anything in connection with the matter which you asked me to investigate. The special League of Nations file which bears the following title:

> "Archives 1933-1940, Legal, Court of International Justice, Registry Number 3C/17664/1589, Statute of the Court and Optional Clause, Geneva, 1920, Signature and Ratification by Nicaragua"

contains as its oldest document a letter from the Foreign Minister of Nicaragua, dated Managua, April 4th, 1935, to the Secretary-General. This letter which deals with the Nicaraguan position with regard to various League of Nations conventions, also contains the following paragraph:

> "Finalmente, el Estatuto de la Corte Permanente de Justicia Internacional, del 13 de Diciembre de 1920; su Protocolo de firma del 16 del propio mes y ano; las Enmiendas al Estatuto rudactadas en revision del mismo y anexas al Protocolo suscrito en Ginebra el 14 de Setiembre de 1929, lo mismo que el otro Protocolo cuyo objetivo fué obtener la adhesion de los Estados Unidos de América al Estatuto de la Corte; instrumentos todos que han sido firmados por Nicaragua, se hallan actualmente sometidoś al Congreso

> de la Republica para su ratificacion constitucional, y en cuanto se cumpla esta formalidad tendré el gusto de remitir los respectivos instrumentos de ratificacion a la Secretaria de la Sociedad de las Naciones."

On May 6th, 1935, Mr. McKinnon Wood, writing on behalf of the Secretary-General, refers to the paragraph quoted above in the following terms:

> "Le Secrétariat a pris bonne note que les instruments d'adhésion de la République de Nicaragua à la convention sur la traite des femmes et des enfants, du 30 septembre 1921, et à la convention relative à la répression de la traite des femmes majeures, du 11 octobre 1933, lui seront adressés prochainement, ainsi que les instruments de ratification sur la convention pour faciliter la circulation internationale des films ayant un caractère éducatif, signée à Genève le 11 octobre 1933, sur le protocole de signature du Statut de la Cour permanente de Justice internationale, du 16 décembre 1920, et sur le protocole concernant la revision de ce Statut et le protocole concernant l'adhésion des Etats-Unis d'Amérique au protocole de signature du Statut de la Cour permanente de Justice internationale, signés à Genève le 14 septembre 1929."

The third document on the file is a cable from Managua under date of November 29th, 1939, received on November 30th, and which reads as follows:

> "Estatuto y Protocolo Corte Permanente Justicia Internacional La Haya ya Fueron Ratificados Punto Enviarasele Opportunamente Instrumento Ratificacion. Relaciones."

On the same day, November 30th, Mr. McKinnon Wood acknowledges by letter the receipt of the above cable.

The file contains nothing more on this matter until, on August 4th, 1942, Professor Manley O. Hudson writes a note to Mr. Sean Lester, then Acting Secretary-General of the League of Nations, asking for exact information on the ratification of the Court Protocol and Statute by Nicaragua. He mentions the existence of the aforementioned telegram, adding:

> "But you have not announced it, and I wonder. Please help me."

On September 15th, 1942, Mr. E. Giraud, on behalf of Mr. Lester, replies to Professor Hudson in the following terms:

> "The position of Nicaragua in regard to the Statute of the Court is as follows:
>
> Nicaragua signed without reservation the Court Protocol of December 16th, 1920, on September 14th, 1929 and the optional clause of Article 36 on September 24th, 1929. The declaration accompanying the signature of the above-mentioned clause was drafted as follows:
>
> > 'On behalf of the Republic of Nicaragua, I recognise as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice.'
>
> We have not received the ratification necessary to complete the signature of the Court Protocol and at the same time to bring into force the obligations concerning Article 36. But on November 29th, 1939, the Secretary-General was informed by telegram that the Court Protocol was ratified by the President of the Republic of Nicaragua. We have however never received the instrument of ratification itself, which should have been sent to us. Nicaragua is therefore not bound either by the Protocol or by the optional clause.

> Perhaps you could take the necessary steps to have the instrument of ratification sent to us."

On September 16th, 1942, Mr. Giraud, once more on behalf of the Secretary-General, writes the following letter, this time to the Minister of Foreign Affairs of Nicaragua:

> "Par un télégramme en date du 29 novembre 1939, vous avez bien voulu me faire savoir que le protocole de signature du Statut de la Cour permanente de Justice internationale (du 16 décembre 1920) avait été ratifié par le président de la République de Nicaragua et que l'instrument de ratification serait envoyé au Secrétariat.
>
> Or, je n'ai jamais reçu cet instrument de ratification dont le dépôt est nécessaire pour faire naître effectivement l'obligation. Peut-être cet instrument s'est-il perdu en cours de route.
>
> J'ai tenu à attirer votre attention sur cette question."

This is the last document in the file in connection with the matter under consideration.

In order to make quite certain that the instrument of ratification had not been received at the time and put in the safe without a relevant mention having been inserted in the file, I had a search made through the contents of the safe. This search has not revealed the presence of the instrument of ratification under reference.

With reference to the two questions raised in the third paragraph of your letter of September 5th, 1955, I therefore feel that we may conclude as follows:

Question A. From the telegram received from the Foreign Minister of Nicaragua, dated November 29th, 1939, it appears that the President of Nicaragua had ratified the protocol of signature of the Statute of the Permanent Court of International Justice. No mention is made of the ratification of the protocol concerning the revision of the statute.

Question B. The instrument of ratification was never deposited with the League of Nations Secretariat.

Trusting that the above information answers your queries satisfactorily, I have the pleasure to remain,

Most sincerely yours,

(Signed) A. PELT,
Director.

Annex 37

"Honduras and Nicaragua : an Opinion By Manley O. Hudson", Memorandum, December 1955 (from Judge Hudson's Papers on Deposit in the Manuscript Division of the Harvard Law School Library)

1. [Illegible.]
2. [Illegible.]

HONDURAS AND NICARAGUA

3. Possibility of Jurisdiction of the International Court of Justice. Honduras was one of the States represented at the Peace Conference in Paris and Versailles in 1919, by Dr. Pelicarpe Bonilla, former President of the Republic. Nicaragua was represented at the Peace Conference in 1919 by Mr. Salvador Chamorro, President of the Chamber of Deputies.

4. The Peace Treaty of Versailles of 28 June 1919 was signed by both representatives. It was brought into force on 10 January 1920, though the representative of neither of these two States participated in bringing it into force. Despite this fact, Honduras and Nicaragua both ratified the Treaty on 3 November 1920.

5. An Article of the Treaty of Versailles of 28 June 1919, which follows Article 440 (not the same as Article 440), provided:

> "Powers of which the seat of Government is outside of Europe will be entitled merely to inform the Government of the French Republic through their diplomatic representative at Paris, that their ratification has been given; in that case they must transmit the instrument of ratification as soon as possible."

In other words, when the draftsmen of one of the great Charters of the World's Peace wished to take advantage of the telegraph or telephone, they provided for it explicitly.

6. Honduras joined the Members of the League of Nations on 3 November 1920; she withdrew from such membership on 10 July 1936, effective, because of the two-year rule, on 9 July 1938.

7. Honduras never took any action with reference to the Statute of the Permanent Court of International Justice, nor with reference to its Optional Clause.

8. Nicaragua joined the Members of the League of Nations on 3 November 1920; she withdrew from such membership on 27 June 1936, effective, because of the two-year rule, on 26 June 1938.

9. On 14 September 1939, the representative of Nicaragua signed the Protocol of Signature of the Statute of the Permanent Court of International Justice; it was understood that the Protocol of Signature would later be ratified by Nicaragua. On this basis, Nicaragua's action was made the subject of a circular letter to the Members of the League of Nations. C.L.246.1929.V., of 12 October 1929.

10. On 24 September 1929, the delegation of Nicaragua signed an accompanying declaration on the recognition of the jurisdiction of the Permanent Court. The text (which is given in an Annex to 88 League of Nations Treaty

Series, 1929, p. 283, and in the International Court of Justice Yearbook 1946-1947, p. 210) is as follows:

> "Au nom de la République de Nicaragua, je déclare reconnaître comme obligatoire et sans condition la juridiction de la Cour permanente de Justice internationale.
>
> Genève, le 24 septembre 1929.
>
> T. F. MEDINA."

This is rendered into English as follows:

> "On behalf of the Republic of Nicaragua, I recognize as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice.
>
> Geneva, September 24, 1929.
>
> T. F. MEDINA."

This action was made the subject of a letter to the Members of the League. C.L.261.1929.V., of 11 October 1929.

11. In form, the declaration was not what it purported to be; it does not bear a connection with any part of the Statute of the Permanent Court of International Justice. The declaration was not effective at the time it was made; for at that time Nicaragua was not a Party to the Statute of the Permanent Court of International Justice, and only Parties to the Statute may make such an obligation.

12. Ten years and two months after Nicaragua's action with reference to becoming a signatory to the Statute of the Permanent Court of International Justice, the Nicaragua Government took certain action. On 29 November 1939, it notified the Secretary General of the League of Nations, by telegraph, of Nicaragua's ratification of the Protocol of Signature.

13. The telegram read as follows:

> Secretario Sociedad Naciones Ginebra Estatuto y Protocole Corte Permanente Justicia Internacional La Haya ya fueron ratificados punto enviarasele oportunamente instrumento ratificacion — relaciones.

The telegram, edited for purposes of information, was as follows:

> Secretariat of the League of Nations Geneva. The Statute and Protocol of the Permanent Court of International Justice at The Hague were ratified. Will send the instrument of ratification at first opportunity. Relations.

14. The occasion never arose on which the Nicaragua Government communicated the ratification. Nothing has been found in La Gaceta, Diario Official, the Republic of Nicaragua; and the documents of the League of Nations yield nothing.

15. In the Collection of Texts Governing the Jurisdiction of the Court, Fourth Edition, January 31, 1932 (Series D, No. 6), p. 51, there is a reference to the French text; nothing about the ratification is said. In Series E, No. 16, p. 331, the last report of the Permanent Court of International Justice, it was said that the telegram announcing the ratification had not been followed up. The statement, which bears no heading referring to Nicaragua, is as follows:

> Protocol of Signature of the Statute of the Court.
> Geneva, December 16th, 1920.
>
> According to a telegram dated November 29th, 1939, addressed to the

League of Nations, Nicaragua had ratified the Protocol, and the instrume of ratification was to follow. The latter however has not been deposited.

16. In the first Yearbook of the International Court of Justice, 1946-194 p. 310, there is also a footnote on the question. The footnote reads follows:

> According to a telegram dated November 29th, 1939, addressed to t League of Nations, Nicaragua had ratified the Protocol of Signature of t Statute of the Permanent Court of International Justice (December 16t 1920), and the instrument of ratification was to follow. Notification concer ing the deposit of the said instrument has not, however, been received the Registry.

17. The telegram of 29 November 1939 mentioned a Protocol of the Permane Court of International Justice; this was the name of the act under which t Statute was launched. The recognition of the compulsory jurisdiction of t Court was not even mentioned in the telegram. Nicaragua was not a Member the League of Nations at the time.

18. The telegram of 29 November 1939 seems to have been the (illegible) st taken in this direction by Nicaragua. The fact that the message to the Secreta General of the League of Nations was in the form of a telegram would seem prevent its entry into force, unless it is sufficient in itself. There had been mention of telegraph, or telegram, in previous negotiations with reference to t Court. The use of the telegraph seemed to be due to the clause in the Treaty Versailles, which is quoted in paragraph 5 of this memorandum. It is not general rule of international intercourse that a telegram will suffice.

19. It would seem that more emphatic action than sending a telegram shou be taken to make Nicaragua a Party to the Statute of the Permanent Court International Justice. It would be capable of becoming a Party to the seco paragraph of Article 36 of the original Court Statute, only if it were a Party the Statute as a whole. Nicaragua seems to have been conscious of this, for it to be noted that she mentioned that a ratification would follow. At any rate, ratification had been received at the Secretariat of the League of Nations by t end of 1945. Nicaragua must, in this respect, have changed her mind. At a rate, we can only act on what she did.

20. It is admitted that at the time of Nicaragua's action in 1939 — 29 November 1939 — a large part of the world was engaged in, or on the e of, a world war. Yet, this would not excuse Nicaragua's failure to formali its action.

21. On 26 June 1945, the Nicaragua Government signed the Charter of t United Nations. The Statute of the International Court of Justice, which follo very closely the Statute of the Permanent Court of International Justice, w included. On 6 September 1945, Nicaragua proceeded with the ratification of t Charter, which became effective on 24 October 1945, when the Charter fi entered into force. Nicaragua thus became a Party to the Statute of t International Court of Justice. She has not taken any action with reference to declaration under Article 36, paragraph 2, of the Statute of the Internation Court of Justice.

22. Under the Statute of the Permanent Court of International Justice, t Secretary General of the League of Nations had no control over a declarati which was made under Article 36, paragraph 2, of the Statute. Under the Statu of the International Court of Justice, a declaration made under Article 3 paragraph 2, of the Statute must be deposited with the Secretary General of t

United Nations. It would seem, therefore, that there can be no question of the ratification of the declaration under Article 36, paragraph 2, of the Statute of the International Court of Justice; at least nothing has been published by the Secretariat.

23. It would seem that under the Statute of the International Court of Justice, the Secretary General of the United Nations has a larger power than he had under the Statute of the Permanent Court of International Justice; but the ratification of the declaration seemed necessary to the men who guided the Permanent Court of International Justice. They required the declaration, and it seems to have been understood at all times that it required a ratification which would pass anyone's muster.

24. It must be admitted, however, that Nicaragua has continued to figure among the States which have accepted the obligations of Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice, and hence of the International Court of Justice. To some extent, paragraph 5 of Article 36 of the Statute of the International Court of Justice, seems to be the reason for this. It is not due to action of the League of Nations Secretariat; that Secretariat protected itself by publishing a footnote on the events of 29 November 1939, and the things which followed it. For the most part, it is due to the fact that a Secretariat is in the habit of following what a preceding Secretariat had done, and it cannot stop to see whether what has been done ought to have been done. Perhaps this habit of following what a predecessor has done, without the predecessor's footnote is responsible for the lack of precision.

25. The writer has received a letter dated 15 September 1942 and written by M. Emil Giraud of the League of Nations Secretariat on behalf of the Secretariat, which, after a review of the history of the matter up to that date, stated that

> Nicaragua is therefore not bound either by the Protocol [of Signature] or by the Optional Clause.

26. On 26 June 1945, the representatives of Honduras signed the Charter of the United Nations, which was ratified on 17 December 1945 by Honduras. On 2 February 1948, a declaration was made recognizing the compulsory jurisdiction of the International Court of Justice; this was not subject to ratification. The text of the declaration as deposited with the Secretary General of the United Nations on 10 February 1948 is as follows:

> El Poder Ejecutivo de la República de Honduras, debidamente autorizado por el Congreso Nacional en Decreto Número Diez de diecinueve de diciembre de mil novecientos cuarenta y siete, y de conformidad con el inciso dos del Artículo treinta y seis del Estatuto de la Corte Internacional de Justicia, hace la siguiente
>
> Declaración
>
> Reconoce como obligatoria *ipso facto* y sin convenio especial, respecto a cualquier otro Estado que acepte la misma obligación, la jurisdición de la Corte Internacional de Justicia en todas las controversias de orden jurídico que versen sobre:
>
> a) la interpretación de un tratado;
> b) cualquier cuestión de derecho internacional;
> c) la existencia de todo hecho que, si fuere establecido, constituiría violación de una obligación internacional;
> d) la naturaleza o extensión de la reparación que ha de hacerse por el quebrantamiento de una obligación internacional.

> Esta declaración se hace bajo condición de reciprocidad y por un término de seis años contados desde la fecha en que se haga su depósito en la Secretaría General de las Naciones Unidas.
>
> Palacio Nacional, Tegucigalpa, D.C., dos de febrero de mil novecientos cuarenta y ocho.
>
> El Presidente de la República: El Ministro de Ralaciones Exteriores:
> *(Firmado)* Tiburcio CARÍAS. *(Firmado)* Silverio LAINES.

In English translation, the declaration was as follows:

> The Executive of the Republic of Honduras, with due authorization from the National Congress granted by Decree Number Ten of the nineteenth of December nineteen hundred and forty-seven, and in conformity with paragraph two of Article thirty-six of the Statute of the International Court of Justice,
>
> Hereby declares:
>
> That it recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes concerning:
>
> (a) the interpretation of a treaty;
> (b) any question of international law;
> (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
> (d) the nature or extent of the reparation to be made for the breach of an international obligation.
>
> This declaration is made on condition of reciprocity and for a period of six years from the date of the deposit of the declaration with the Secretary-General of the United Nations.
>
> National Palace, Tegucigalpa, D.C., the second of February, nineteen hundred and forty-eight.
>
> President of the Republic: Minister for External Relations:
> *(Signed)* Tiburcio CARÍAS A. *(Signed)* Silverio LAINES.

27. Admitting the effect of a lapse of time on the declaration, a declaration of 19 April 1954 was deposited by Honduras with the Secretariat of the United Nations, on 24 May 1954. No ratification of this document was necessary. The text of this declaration was as follows:

> El Poder Ejecutivo de la República de Honduras debidamente autorisado por el Congreso Nacional en Decreto Número Setenta y siete de trece de febrero de mil novecientos cincuenta y cuatro, para que se renueva la Declaración a que se refiere el inciso dos del Artículo treinta y seis del Estatuto de la Corte Internacional de Justicia, por la presente
>
> DECLARA:
>
> Que renueva la Declaración que hiciera el dos de febrero de mil novecientos cuarenta y ocho, reconociendo como obligatoria *ipso facto* y sin convenio especial, respecto a cualquier otro Estado que acepte la misma obligación, la jurisdicción de la Corte Internacional de Justicia en todas las controversias de orden jurídico que versen sobre:

a. la interpretación de un tratado;
b. cualquier cuestión de derecho internacional;
c. la existencia de todo heche que, si fuera establecido, constituiría violación de una obligación internacional;
d. la naturaleza y extensión de la reparación que ha de hacerse por el quebrantamiento de una obligación internacional.

Esta renovación se hace bajo condición de reciprocidad y por término de seis años renovables por tácita reconducción, contados desde la fecha en que se haga su déposito en la Secretaría General de las Naciones Unidas.

Palacio Nacional, Tegucigalpa, D.C., diecinueve de abril de mil novecientos cincuenta y cuatro.

(f.) Juan Manuel GALVES.

El Secretario de Estado en el Despacho
de Relaciones Exteriores,
(f.) J. E. VALENZUELA.

The declaration was, in English translation, in these terms:

The Executive Power of the Republic of Honduras, having been duly authorized by the National Congress under Decree No. 77 of 13 February 1954, to renew the Declaration referred to in Article 36 (2) of the Statute of the International Court of Justice,

Hereby declares:

That it renews the Declaration which it made on 2 February 1948, recognizing as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;
b. any question of international law;
c. the existence of any fact which, if established, would constitute a breach of an international obligation;
d. the nature and extent of the reparation to be made for the breach of an international obligation.

This declaration of renewal is made on condition of reciprocity, for a period of six years, renewable by tacit reconduction, from the date on which it is deposited with the Secretary-General of the United Nations.

National Palace, Tegucigalpa, D.C., 19 April 1954.

(Signed) Juan Manuel GALVES.

(Signed) J. E. VALENZUELA,
Secretary of State for Foreign Affairs.

28. The declaration of Honduras of 1954 is undoubtedly the one which is binding upon it today, *vis-à-vis* States that have accepted a similar obligation.

29. It will be noted that it renews the declaration of 1948, making a change in the text. In paragraph (d) of 2 February 1948, it reads as follows:

(d) the nature *or* extent of the reparation to be made for the breach of an international obligation.

In paragraph d. of 19 April 1954, it reads as follows:

> d. the nature *and* extent of the reparation to be made for the breach of an international obligation.

It seems doubtful whether the Court will lay any stress upon this change.

30. Article 36, paragraph 5, of the Statute of the International Court of Justice declares that declarations made under Article 36 of the Statute of the Permanent Court of International Justice shall be deemed, as between the Parties of the present Statute, to be acceptance of the compulsory jurisdiction of the International Court of Justice.

31. The jurisdiction of the International Court of Justice is compulsory *ipso facto* and without special agreement. It relates to another State which has accepted the same obligation. This is the jurisdiction of the International Court of Justice in the legal dispute which is involved.

32. The jurisdiction, in fact, calls for the interpretation of a treaty; it involves a question of the interpretation of the Treaty for the Demarcation of the Boundaries between Honduras and Nicaragua signed at Tegucigalpa on October 7, 1894, especially of Articles III, IV, and V of the Treaty. The dispute also relates to any question of international law, for it is a dispute as to whether Nicaragua is bound by the international law which applies to Honduras and the other nations which are parties to Article 36, paragraph 2, of the Statute. The dispute also relates to the existence of any fact which, if established, would constitute a breach of international obligation, for it proposes to establish an international obligation which Nicaragua is in fact disregarding. It may be confidently relied upon that the dispute will relate to "the nature or extent", or to "the nature and extent", of the reparation to be made for the breach of an international obligation by Nicaragua.

33. In accordance with the first provision in Article 38 of the Statute of the International Court of Justice, it has the function to decide in accordance with international law such disputes as are submitted to it. The declaration is "in relation to any other State accepting the same obligation". It will be a dispute concerning the execution of an arbitral award, and it will fall generally under (a)-(d) of the second paragraph of Article 36 of the Statute of the International Court of Justice.

34. It must be borne in mind that the International Court of Justice has not determined whether there is any degree to which the Nicaragua Government is bound by the declaration of 24 September 1929, as to the International Court of Justice. Without such determination, it is impossible to say definitely whether or not the Government of Honduras may proceed against the Government of Nicaragua.

35. It would seem possible that some other jurisdiction may be envisaged in this connection; for example, the Parties might agree upon the dispute's being handled by a Tribunal *ad hoc*.

36. It is also possible that the action should be begun against Nicaragua in spite of the fact that that State is not bound by the second paragraph of Article 36 of the Statute of the International Court of Justice. If Nicaragua later agrees to the jurisdiction, the situation will be much the same as if it had agreed to a special agreement in advance of the case. Though a State is not bound by the jurisdictional clause of Article 36, it may decide to defend its case before the Court.

37. In 1954 two actions were begun by the United States against Hungary and the Soviet Union, and in 1956 two actions were begun by the United States against Czechoslovakia and the Soviet Union; and in 1955, two actions were

begun by the United Kingdom against Argentina and Chile. In all of these cases, the respondent State failed to agree to the jurisdiction, and the Court could not entertain it.

38. It might be possible also for Honduras to persuade the General Assembly of the United Nations to confer the power to request an opinion on some body connected with the American States. In this case, it would be more probable that the question at issue would be understood by the organs of the American States.

39. The International Court of Justice will not take a decision pending the submission of the question of its jurisdiction. This would require the action of two Parties.

40. It may be for other people to have their ideas as to what the Court will decide. The writer cannot speak for them; but the writer would not be surprised if the Court should say that Nicaragua is not bound to submit to its jurisdiction.

Annex 38

LETTER FROM JUDGE HUDSON TO THE FOREIGN MINISTER OF HONDURAS, DATED 12 AUGUST 1955 (FROM JUDGE HUDSON'S PAPERS ON DEPOSIT IN THE MANUSCRIPT DIVISION OF THE HARVARD LAW SCHOOL LIBRARY)

Your Excellency,

1. I am confronted with a difficulty in connection with the opinion which I am writing for you on the Honduras-Nicaragua question. Will you please let me explain it to you, and if you can send me anything on it, I believe it might make it possible for us to complete the work.

2. On 24 September 1929, Nicaragua accepted the Article 36, paragraph 2, by making the following declaration:

> On behalf of the Republic of Nicaragua, I recognize as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice.
>
> Geneva, September 24, 1929. *(Signed)* T. F. MEDINA.

At this date, Nicaragua had not signed the Protocol of Signature of the Permanent Court of International Justice, and the action of 24 September 1929 was not immediately effective because Nicaragua had not ratified the Protocol of Signature.

3. It did not take this action until on 29 November 1939, when the Nicaraguan Government notified the Secretary General of the League of Nations by telegraph of Nicaragua's ratification of the Protocol of Signature; the telegram does not seem to have mentioned the acceptance of compulsory jurisdiction, though I am not certain of this. Of course, Nicaragua should have sent a ratification of the Protocol and the Statute of the Court. I can't find that they did so.

4. Nicaragua is still listed as a State which is one of those which has signed the Protocol of compulsory jurisdiction. Sed quaere.

5. I must confess that the problem has interest. A telegraph by Nicaragua would not be a way for them to add to the legal consequences of the action of 1929. So that from September 1929 to the signature of the Charter of the United Nations, I doubt whether Nicaragua did anything to remedy the situation. She certainly was not a signatory.

6. However, on 26 June 1945, Nicaragua signed the Charter of the United Nations, and ratified it on 6 September 1945; it became effective on 24 October 1945. This did not, in any way, affect the compulsory jurisdiction.

7. The problem that worries me is, can Nicaragua be bound by the clause today? Can you send me any documents which would enlighten this action?

(Signed) Manley O. HUDSON.

Annex 39

American Treaty on Pacific Settlement (The "Pact of Bogotá")

The American Treaty on Pacific Settlement (the "Pact of Bogotá"), 30 U.N.T.S. 55, is one of the basic instruments of the Organization of American States. It commits its parties, in the event that a controversy arises among them which cannot be settled through ordinary diplomatic channels, "to use the procedures established in the present Treaty, in the manner and under the conditions provided . . ., or, alternatively, such special procedures as, in their opinion, will permit them to arrive at a solution". *Ibid.*, Article 2. The Pact of Bogotá requires peaceful settlement generally, but it does not require the selection of any particular method to achieve that result. Parties to the Pact are not required to accept the jurisdiction of the International Court of Justice except under particular circumstances. And, like other treaties, the Pact creates no rights or obligations with respect to non-parties.

The Pact describes four peaceful settlement procedures. One of these is recourse to the International Court of Justice. Parties may agree at any time to submit a dispute between them to the Court, but compulsory jurisdiction is only a "contingent" obligation, arising only in particular circumstances.

Articles 31 and 32 together define the obligation to accept the Court's jurisdiction. Article 31 commits the parties to accept the Court's compulsory jurisdiction. Article 31 also describes the categories of disputes that may be brought before the Court; these are coextensive with the categories in Article 36 (2) of the Statute of the Court. Article 32 describes the circumstances under which the Court's compulsory jurisdiction may be invoked. Article 32 states:

> "*When the conciliation procedure previously established in the present Treaty or by agreement of the parties does not lead to a solution, and the said parties have not agreed on an arbitral procedure*, either of them shall be entitled to have recourse to the International Court of Justice in the manner prescribed in Article 40 of the Statute thereof. The Court shall have compulsory jurisdiction in accordance with Article 36, paragraph 1, of the said Statute." (Italics added.)

As aptly summarized by the first Secretary General of the OAS, this article establishes only a "contingent obligatory step". Lleras, *Report on the Ninth International Conference of American States, Annals of the Organization of American States*, Vol. I, No. 1, at p. 48 (1949)[1].

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[1] Secretary General Lleras described the operation of the Pact in this respect in the following terms:

> "The procedures are not given in the Treaty in any order of preference, and the parties may select the one they consider most appropriate in each case, without being under obligation to utilize all the procedures. It might occur, for example, that from the time of disruption of direct negotiations in a given case there might be agreement to submit the dispute to arbitration or to the International Court of Justice, without resorting to conciliation or good offices and mediation. But should the conciliatory stage pass without producing results — either because one of the parties was opposed or because no agreement could be reached — then judicial procedure becomes compulsory if one of the parties appeals to the International Court of Justice."

Nicaragua asserts that Article 31 of the Pact constitutes a declaration under Article 36 (2) of the Statute of the Court. Nicaraguan Memorial, para. 93, n. 2 at p. 52. But it is apparent from the form of the document that Articles 31 and 32 of the Pact are intended to be a treaty creating jurisdiction under Article 36 (1) of the Court's Statute, and not to be a declaration under Article 36 (2). Declarations under Article 36 (2) of this Court's Statute are always unilateral, and, in accordance with Article 36 (4) of the Statute, must be deposited with the Secretary-General of the United Nations. The Pact of Bogotá, however, was a multilateral treaty and was not deposited with the Secretary-General[1]. Articles 52 and 57 of the Pact name the Pan American Union depositary for the treaty and require it only to "register" the treaty with the Secretariat of the United Nations. There is no provision for deposit of the treaty as a declaration, nor was it deposited[2].

Furthermore, Article 31 could not operate as an Article 36 (2) declaration because it does not entail "the same obligation" as such a declaration. While the text of Article 31 generally follows that of Article 36 (2), other articles in the Pact render it a significantly more limited obligation. First, as already discussed, the obligation under the Pact to submit to the Court's compulsory jurisdiction is, pursuant to Article 32, contingent upon the exhaustion of other methods of peaceful settlement provided for in the Pact.

Second, the enforcement procedure stated in Article 50 of the Pact is quite different from that under the United Nations Charter, which governs Article

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Op. cit., at pp. 48-49. The United States Delegation to the Bogotá Conference similarly reported:

> "In conformity with the earlier articles of the treaty, the [ ] provisions [for compulsory judicial settlement and arbitration contained in chapters four and five] do not place the parties under an immediate obligation to submit cases to these procedures."

Report of the Delegation of the United States to the Ninth International Conference of American States, at p. 47 (1948).

[1] That Article 31 of the Pact establishes the Pact as a treaty for purposes of Article 36 (1) of the Statute of the Court is also reflected in the minutes of the sessions at Bogotá where the rapporteur of the drafting committee stated (in translation):

> "This article of the draft [which became Article 31] develops the principle contained in paragraph 1 of Article 36 of the Statute of the Court. That article, as the delegates well remember, says that, 'The jurisdiction of the Court comprises all cases which the parties refer to it . . .'; and this article of the draft says that the High Contracting Parties agree to submit to the International Court of Justice all cases which arise among them."

> ("Este artículo del proyecto desarrolla el principio contenido en el ordinal 1 del Artículo 36 del Estatuto de la Corte. Ese artículo, como lo recuerdan bien los señores delegados, dice que, 'La competencia de la Corte se extiende a todos los litigios que las partes le sometan. . .'; y este artículo del proyecto dice que las Altas Partes Contratantes se obligan a someter a la Corte Internacional de Justicia todos los litigios que surjan entre ellas.")

Novena Conferencia Internacional Americana, Actas y documentos, Vol. IV, at 157 (1948). The word "declare", as it is used in Article 31, is not a unilateral declaration but rather the formula by which the parties accept jurisdiction in accordance with the terms of the Pact, including the terms of Article 36 (2) and pursuant to Article 36 (1) of the Statute of the Court.

[2] The drafters of the Pact were aware that acceptance of compulsory jurisdiction by declaration pursuant to Article 36 (2) required that a special procedure be followed and chose not to provide for it. See, for example, *Novena Conferencia Internacional Americana, Actas y documentos*, Vol. IV, at 164 (1948).

36 (2) declarations. Under Article 94 of the United Nations Charter, a party to a case before the Court may have immediate recourse to the Security Council if another party fails to perform obligations under a judgment rendered by the Court. Article 50 of the Pact, however, restricts the right to go to the Security Council by providing an intermediate step in the form of a Meeting of Consultation of Ministers of Foreign Affairs "to agree upon appropriate measures to ensure the fulfillment of the judicial decision or arbitral award". Article 32 and Article 50 of the Pact thus both entail material departures from the obligation entailed in Article 36 (2) of the Statute of the Court and would prevent Article 31 of the Pact from being treated as a declaration made under Article 36 (2) of the Statute, even if the drafters had intended it to be a declaration.

Contrary to Nicaragua's assertion, the Registrar of this Court has treated the Pact as not entailing declarations under Article 36 (2). When the Pact entered into force, it was listed in Part II of Chapter X of the 1947-1948 *Yearbook*: "Instruments for the pacific settlement of disputes and concerning the jurisdiction of the Court." The part was subdivided, and the Pact was *distinguished* from declarations made under Article 36 (2). It was listed *not* in Subpart A ("Acceptance of the compulsory jurisdiction of the Court in pursuance of Article 36 (2) of the Statute") but in Subpart B ("Other Instruments"). The Registrar found the Pact to be an instrument "whose main purpose [was] the pacific settlement of disputes", *Yearbook 1948-1949*, p. 131, but not entailing an acceptance of compulsory jurisdiction pursuant to Article 36 (2). It was not listed in Part III with the other Article 36 (1) treaties because its "main purpose" was dispute resolution; other Article 36 (1) agreements had other purposes, and only incidentally contained compromissory clauses referring to the Court. The Court's current *Yearbook 1982-1983* (p. 92) continues to list the Pact among "other instruments" and not among Article 36 (2) declarations.

Nicaragua also asserts that Article 31 of the Pact of Bogotá "is effective beyond the High Contracting Parties to the Treaty". Nicaraguan Memorial, para. 93, n. 2 at p. 52. According to Nicaragua, that Article refers to disputes between the parties and "any other American State", whether party or non-party. In the Spanish and English texts of Article 31, the key phrase is as follows:

> ". . . *las Altas Partes Contratantes* declaran que reconocen respecto a cualquier otro Estado Americano como obligatoria *ipso facto*, . . ., la jurisdicción de la [ ] Corte [Internacional de Justicia] en todas las controversias de orden jurídico que surjan *entre ellas* . . . (italics added)."

> ". . . *the High Contracting Parties* declare that they recognize, in relation to any other American State, the jurisdiction of the [International] Court [of Justice] as compulsory *ipso facto*, . . ., in all disputes of a juridical nature that arise *among them*. . . ."

Disputes that arise "among them" refers to disputes that arise among the High Contracting Parties. This is evident in the Spanish text because of the agreement between "entre ellas" ("among them") and "Las Altas Partes" (the High Parties), both of which use the feminine plural form. This grammatical agreement between "ellas" and its antecedent, "Las Altas Partes", is apparent also in the Portuguese and French texts of the Treaty. To include a dispute between a party and a non-party American State ("Estado Americano"), as Nicaragua argues, the masculine plural pronoun ("ellos") would have been required. The text is ambiguous only in the English language, where there is no agreement of gender between pronouns and antecedents. The language and grammar of the other texts make it clear that Article 31 only applies to disputes among parties to the Treaty[1].

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[1] The presence of the phrase "American State" may be explained as a practical matter by the fact that the delegates at Bogotá, who had assembled to draft a number of basic instruments for a new Organization of American States, expected that all members of the Organization would become parties to all the basic instruments. The phrase "American State" was thus considered interchangeable with "party" to any of these instruments, including the Pact of Bogotá.

Annex 40

TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN NICARAGUA AND THE UNITED STATES OF AMERICA, SIGNED AT MANAGUA, 21 JANUARY 1956, ENTERED INTO FORCE, 24 MAY 1958. 9 *UST* 449; *TIAS* 4024; 367 *UNTS* 3

[Not reproduced]

Annex 41

COMMITTEE ON FOREIGN RELATIONS, EXECUTIVE REPORT NUMBER 9, COMMERCIAL TREATIES WITH IRAN, NICARAGUA AND THE NETHERLANDS, US SENATE, 84TH CONGRESS, 2D SESSION, 9 JULY 1956

MR. GEORGE, from the Committee on Foreign Relations, submitted the following

REPORT

[To accompany Executive E, Executive G, and Executive H, 84th Congress, 2d session]

The Committee on Foreign Relations, having had under consideration the treaties listed below, recommends that the Senate give its advice and consent to their ratification:

1. Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, signed at Tehran on August 15, 1955 (Ex. E, 84th Cong., 2d sess.);
2. Treaty of Friendship, Commerce, and Navigation with the Republic of Nicaragua, and a protocol relating thereto, signed at Managua on January 21, 1956 (Ex. G, 84th Cong., 2d sess.); and
3. Treaty of Friendship, Commerce, and Navigation between the United States of America and the Kingdom of the Netherlands, together with a protocol and an exchange of notes relating thereto, signed at The Hague on March 27, 1956 (Ex. H, 84th Cong., 2d sess.).

MAIN PURPOSE

The objective of these treaties is to establish a comprehensive reciprocal basis for the protection of American commerce and citizens, and their business and other interests abroad. To this end they provide either national or most-favored-nation treatment with respect to entry, travel and residence, basic personal freedoms, guaranties with respect to property rights, the conduct and control of business enterprises, taxation, exchange restrictions, the exchange of goods, and navigation. The treaty with Iran, in addition, has broad provisions concerning the privileges and immunities of consular officers such as are usually found in more detailed form in consular conventions.

The treaties with Nicaragua and the Netherlands follow in practically all respects the provisions of previous postwar commercial treaties, the most recent of which, a treaty with the Federal Republic of Germany, was approved by the Senate on July 27, 1955, by a vote of 83 to 0. The Iranian treaty is somewhat more general and compares closely with the treaty of amity and economic relations with Ethiopia, approved by the Senate July 21, 1954, by a vote of 86 to 1. The provisions of the three treaties are further summarized and discussed, particularly in the respects in which they differ from other postwar commercial treaties, in other sections of this report.

BACKGROUND AND COMMITTEE ACTION

These are the 13th, 14th and 15th treaties of friendship, commerce, and navigation entered into since World War II. They are a part of a continuing program of this Government to bring earlier treaties up to date and negotiate new ones with nations with which the United States does not have such treaties.

The Iran treaty replaces two provisional agreements of 1928. The Nicaraguan treaty replaces one of 1867 which was terminated in 1902. The Netherlands treaty replaces a convention of 1852 and an agreement on trademarks of 1883.

The latest of these three treaties was received by the Senate on May 7, 1956. During the time that they have been pending before the Foreign Relations Committee, the committee received no indication of opposition to their provisions.

On July 3, 1956, the committee heard Thorsten V. Kalijarvi, Deputy Assistant Secretary of State, on the three commercial treaties. Although this hearing was in executive session, it has been printed for the information of the Senate along with the additional information requested at that time and supporting statements received by the committee from the American Arbitration Association and the Bar Association of the city of New York.

At the conclusion of the hearing on July 3, 1956, the committee voted to report the treaties favorably to the Senate for action thereon.

. . . .

SUMMARY OF THE TREATY WITH NICARAGUA

Under article I each party agrees to accord equitable treatment to the persons, property, enterprises, and other interests of nationals and companies of the other party.

Article II provides for entry, residence, travel, religious freedom, and the right to gather and disseminate information and to communicate with other persons, subject to necessary measures to maintain public order and protect the public health, morals, and safety.

Article III provides for the treatment of nationals of either party when taken into custody by the other.

Article IV extends the applicable workmen's compensation and social-security benefits of one party to nationals of the other within its territories.

By article V national and most-favored-nation treatment is assured for access to courts and administrative tribunals.

Article VI guarantees property rights against unreasonable searches and seizures. If any property is expropriated for public purposes or reasons of social utility, it shall be compensated for promptly and fairly.

The right of nationals of one party to do business in the territory of the other party is set forth in article VII, subject to limitations which each party reserves to itself on public utilities, shipbuilding, air or water transport, banking, or the exploitation of land or other natural resources.

Articles VIII and IX cover the rights to employ accountants, executive personnel, attorneys, agents, and so forth, to engage in scientific, educational, religious, and philanthropic activities on the basis of national treatment, to lease land and buildings and other immovable property, to dispose of inheritances which by reason of alienage cannot be retained, and to own, possess and dispose of personal property.

Article X concerns patents and trademarks and provides for cooperation in furthering the interchange and use of scientific and technical knowledge, particularly in the interests of "increasing productivity and improving standards of living".

Article XI guarantees national and most-favored-nation treatment regarding taxation except for reserved rights to —

> *(a)* Extend specific advantages regarding taxes, fees, and charges to nationals, residents, and companies of other countries on a basis of reciprocity;
>
> *(b)* Accord special tax advantages by virtue of agreements for the avoidance of double taxation or the mutual protection of revenue; and
>
> *(c)* Apply special provisions in allowing to nonresidents exemptions of a personal nature in connection with income and inheritance taxes.

Article XII concerns exchange restrictions and commits the parties to impose them only when necessary, without discrimination, and subject to provisions for withdrawal of certain categories of foreign exchange.

Article XIII accords most-favored-nation treatment to commercial travelers, their samples, and the taking of orders.

Articles XIV and XV provide most-favored-nation treatment by one party to the products of the other party. This shall not apply, however, to products of national fisheries, advantages accorded to adjacent countries in order to facilitate frontier traffic, or to advantages obtained through membership in a customs union or free trade area. Prompt publication of customs laws and regulations and an appeals procedure are also specified.

National and most-favored-nation treatment is provided under article XVI by each party in matters affecting internal taxation, sale, distribution, storage, and use of products of the other. The article also defines "coffee" to designate the coffee bean or consumable preparations made from the coffee bean and the parties agree to continue present policies designed to prevent the commercial usage of that term in any deceptive manner.

Articles XVII and XVIII deal with Government corporations or enterprises and monopolies and insure competitive equality with private enterprise.

Articles XIX and XX concern freedom of navigation and freedom of transit. Article XXI contains the usual exceptions relating to the import of gold and silver, to fissionable materials, to traffic in arms, ammunition and implements of war and to measures for collective or individual self-defense. An additional exception is made to cover any special benefits or advantages which Nicaragua may accord to other Central American Republics as a result of the creation of an integrated Central American regional economic organization.

Article XXII contains definitions; article XXIII territorial application; article XXIV consultation and settlement of disputes; and article XXV duration, which is set at 10 years and thereafter unless denounced by one party after 1 year's written notice.

The protocol elaborates or further defines certain provisions of the treaty.

. . . .

MATTERS CONSIDERED BY THE COMMITTEE

. . . .

Economic integration or union. — The committee took note of provisions in the treaties with Nicaragua and the Netherlands designed to enable these countries to become members of regional economic groupings, members of which would accord to each other more favorable treatment in certain matters than they would to nonmembers. Although the provisions of the two treaties differ from each other, their general purpose is to release Nicaragua and the Netherlands from the obligation to accord the United States most-favored-nation treatment with respect to those matters in the event that such economic integration or union takes place within their respective regions. In the case of the Netherlands, the United States would, for its part, be released from the obligation to accord the Netherlands most-favored-nation treatment in those respects.

Annex 42

INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 1984, PUBLIC LAW 98-215 §109. (A), DECEMBER 9, 1983 (EXCERPTS)

An Act to authorize appropriations for fiscal year 1984 for intelligence and intelligence-related activities of the United States Government, for the Intelligence Community Staff, for the Central Intelligence Agency Retirement and Disability System, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That this Act may be cited as the "Intelligence Authorization Act for Fiscal Year 1984".

TITLE I — INTELLIGENCE ACTIVITIES

AUTHORIZATION OF APPROPRIATIONS

SEC. 101. Funds are hereby authorized to be appropriated for fiscal year 1984 for the conduct of the intelligence and intelligence-related activities of the following elements of the United States Government:

(1) The Central Intelligence Agency.
(2) The Department of Defense.
(3) The Defense Intelligence Agency.
(4) The National Security Agency.
(5) The Department of the Army, the Department of the Navy, and the Department of the Air Force.
(6) The Department of State.
(7) The Department of the Treasury.
(8) The Department of Energy.
(9) The Federal Bureau of Investigation.
(10) The Drug Enforcement Administration.

CLASSIFIED SCHEDULE OF AUTHORIZATIONS

SEC. 102. The amounts authorized to be appropriated under section 101, and the authorized personnel ceilings as of September 30, 1984, for the conduct of the intelligence and intelligence-related activities of the elements listed in such section, are those specified in the classified Schedule of Authorizations prepared by the committee of conference to accompany H.R. 2968 of the Ninety-eighth Congress. That Schedule of Authorizations shall be made available to the Committees on Appropriations of the Senate and House of Representatives and to the President. The President shall provide for suitable distribution of the Schedule, or of appropriate portions of the Schedule within the executive branch.

CONGRESSIONAL NOTIFICATION OF EXPENDITURES IN EXCESS OF PROGRAM AUTHORIZATIONS

SEC. 103. During fiscal year 1984, funds may not be made available for any intelligence or intelligence-related activity unless such funds have been specifically authorized for such activity or, in the case of . . .

LIMITATION ON COVERT ASSISTANCE FOR MILITARY OPERATIONS IN NICARAGUA

SEC. 108. During fiscal year 1984, not more than $24,000,000 of the funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual.

CONGRESSIONAL FINDINGS

SEC. 109. (a) The Congress finds that —

(1) the Government of National Reconstruction of Nicaragua has failed to keep solemn promises, made to the Organization of American States in July 1979, to establish full respect for human rights and political liberties, hold early elections, preserve a private sector, permit political pluralism, and pursue a foreign policy of nonaggression and nonintervention;

(2) by providing military support (including arms, training, and logistical, command and control, and communications facilities) to groups seeking to overthrow the Government of El Salvador and other Central American governments, the Government of National Reconstruction of Nicaragua has violated article 18 of the Charter of the Organization of American States which declares that no state has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other state;

(3) the Government of Nicaragua should be held accountable before the Organization of American States for activities violative of promises made to the Organization and for violations of the Charter of that Organization; and

(4) working through the Organization of American States is the proper and most effective means of dealing with threats to the peace of Central America, of providing for common action in the event of aggression, and of providing the mechanisms for peaceful resolution of disputes among the countries of Central America.

(b) The President should seek a prompt reconvening of the Seventeenth Meeting of Consultation of Ministers of Foreign Affairs of the Organization of American States for the purpose of reevaluating the compliance by the Government of National Reconstruction of Nicaragua —

(1) with the commitments made by the leaders of that Government in July 1979 to the Organization of American States; and

(2) with the Charter of the Organization of American States.

(c) The President should vigorously seek actions by the Organization of American States that would provide for a full range of effective measures by the member states to bring about compliance by the Government of National Reconstruction of Nicaragua with those obligations, including verifiable agreements to halt the transfer of military equipment and to cease furnishing of military support facilities to groups seeking the violent overthrow of governments of countries in Central America.

(d) The President should use all diplomatic means at his disposal to encourage the Organization of American States to seek resolution of the conflicts in Central America based on the provisions of the Final Act of the San José Conference of October 1982, especially principles (d), (e), and (g), relating to nonintervention in the internal affairs of other countries, denying support for terrorist and subversive elements in other states, and international supervision of fully verifiable arrangements.

(e) The United States should support measures at the Organization of American States, as well as efforts of the Contadora Group, which seek to end support for terrorist, subversive, or other activities aimed at the violent overthrow of the governments of countries in Central America.

(f) Not later than March 15, 1984, the President shall report to the Congress on the results of his efforts pursuant to this Act to achieve peace in Central America. Such report may include such recommendations as the President may consider appropriate for further United States actions to achieve this objective.

TITLE II — INTELLIGENCE COMMUNITY STAFF

AUTHORIZATION OF APPROPRIATIONS

SEC. 201. There is authorized to be appropriated for the Intelligence Community Staff for fiscal year 1984 the sum of $18,500,000.

AUTHORIZATION OF PERSONNEL END-STRENGTH

SEC. 202. (a) The Intelligence Community Staff is authorized two hundred and fifteen full-time personnel as of September 30, 1984. Such personnel of the Intelligence Community Staff may be permanent employees of the Intelligence Community Staff or personnel detailed from other elements of the United States Government.

(b) During fiscal year 1984, personnel of the Intelligence Community Staff shall be selected so as to provide appropriate representation from elements of the United States Government engaged in intelligence and intelligence-related activities.

(c) During fiscal year 1984, any officer or employee of the United States or a member of the Armed Forces who is detailed to the Intelligence Community Staff from another element of the United States Government shall be detailed on a reimbursable basis, except that any such officer, employee or member may be detailed on a nonreimbursable basis for a period of less than one year for the performance of temporary functions as required by the Director of Central Intelligence.

INTELLIGENCE COMMUNITY STAFF ADMINISTERED IN SAME MANNER AS CENTRAL INTELLIGENCE AGENCY

SEC. 203. During fiscal year 1984, activities and personnel of the Intelligence Community Staff shall be subject to the provisions of the National Security Act of 1947 (50 U.S.C. 401 et seq.) and the Central Intelligence Agency Act of 1949 (50 U.S.C. 403a-403n) in the same manner as activities and personnel of the Central Intelligence Agency.

Annex 43

"FOR THE RECORD", FROM A STATEMENT, 29 MARCH 1984, BY SENATOR DANIEL PATRICK MOYNIHAN (DEMOCRAT — NEW YORK), 10 APRIL 1984, *WASHINGTON POST*, P. A-20

It is the judgment of the [Senate] Intelligence Committee that Nicaragua's involvement in the affairs of El Salvador and, to a lesser degree, its other neighbors, continues. As such, our duty, or at very least our right, now as it was [last November] is to respond to these violations of international law and uphold the charter of the OAS.

Specifically, arms and materiel still flow from the communist bloc through Nicaragua to the insurgents in El Salvador. Yesterday, many of my colleagues will have read the reports in various newspapers about testimony of the undersecretary of defense for policy, Fred C. Ikle, in which he confirmed that approximately half the weapons used by the Salvadoran guerrillas were captured or acquired from the Salvadoran armed forces. This is undoubtedly true.

It is also true, however, that the other half, or the greater part thereof, come via Nicaragua and further the intelligence community's latest and best estimate is that a predominant percentage of their ammunition, about 80 percent, still comes via Nicaragua. Estimates about the remaining materiel is similar. What the House Intelligence Committee stated last May is still true:

> "[The insurgency in El Salvador] depends for its lifeblood — arms, ammunition, financing, logistics and command-and-control facilities — upon outside assistance from Nicaragua and Cuba."

In sum, the Sandinista support for the insurgency in El Salvador has not appreciably lessened; nor, therefore, has their violation of the OAS charter abated.

Annex 44

CONGRESSIONAL RECORD, 2 AUGUST 1984, PP. H 8268-8269

. . . .

Mr. COLEMAN of Missouri. Mr. Chairman, we are now witnessing the slow strangulation by the majority party of America's fundamental commitment to democracy in Central America. Section 107 of the legislation before us today includes language which goes way beyond the Boland-Zablocki language of 2 years ago that governed covert activities in Nicaragua. Under Boland-Zablocki no funds could be used to overthrow the Government of Nicaragua. Under this bill the CIA could not even help fund the interdiction of arms flowing from Nicaragua into El Salvador.

This bill is aimed at denying U.S. aid to the Contras fighting against the unelected Sandinista junta in Nicaragua. But the language of this bill goes much further. It denies aid to any group which might attempt to oppose any government of Nicaragua.

Suppose the Sandinista junta continues to tighten its control over the people of Nicaragua, completely closes down La Prensa, the only so-called free press, or outlaws the Catholic church, because it is opposed to the junta — as it is. Then suppose they decide to outlaw all political parties because the upcoming "election" will, as they say, "establish beyond a shadow of doubt that the Nicaraguan people do not want any other parties in their country". And then, suppose that the Nicaraguan people, chafing under the growing totalitarianism, urged on by men and women committed to democracy, decided to fight.

Would we be able to help them in their struggle? Under this bill the answer is no.

Suppose then that like Angola, Ethiopia, or Afghanistan, the Sandinistas call upon their Communist brethren to come to their aid, to send Cuban combat troops, perhaps even the Soviet combat brigade stationed in Cuba. Would we then be able to aid people fighting against this tyranny? Under this bill the answer is, once again, unequivocally no. The bill would leave the United States with only one option — commitment of military troops — which no one, I repeat, no one on this side of the aisle wants to see happen.

In other words the majority party is saying today, that there is absolutely nothing, under any circumstances, they are willing to do to aid Nicaraguans who are forced to fight for their freedom.

This bill, in the final analysis, states that the only "acceptable" thing for the United States to do, is to do nothing.

In desperation to adhere to this "do nothing" policy, my colleagues on the other side of the aisle are now deliberately ignoring basic realities in Nicaragua. The Sandinista junta is becoming more oppressive — civil, political, and human rights are fewer than when they took power. Other groups which took part in the revolution have in standard Communist fashion been dispensed with one by one, until only the Sandinistas remain.

Which country is providing safe haven, weapons, military training, and official support of leftist guerrillas fighting against the democratically elected Government of El Salvador? It is the Sandinistas of Nicaragua. Under this bill we can do nothing about that.

I would like to ask the chairman of the committee, the gentleman from Massachusetts [Mr. BOLAND], to enter into a colloquy, and I would ask if the gentleman might answer some questions.

In May of 1983 in your report, in the intelligence authorization bill, the committee said on page 6 that it believes that the intelligence available to it continues to support the following judgments with certainty:

One, a major portion of the arms and other materials sent by Cuba and other Communist countries to the Salvadoran insurgents, transits Nicaragua with the permission and assistance of the Sandinistas.

Is that true today, Mr. Chairman?

Mr. BOLAND. Will the gentleman yield?

Mr. COLEMAN of Missouri. I yield to the gentleman.

Mr. BOLAND. As the gentleman knows, that particular reference in the report has been used many times in the debate on the military power and military operations in Nicaragua, and that precisely was the judgment of the committee. That generally is the judgment of the committee today.

Mr. COLEMAN of Missouri. Did you answer yes or no to that question?

Mr. BOLAND. You have reference to the report that was made by this committee in 1983?

Mr. COLEMAN of Missouri. Right.

Mr. BOLAND. Pointing to and indicating that there is clear and convincing evidence that military equipment is going to El Salvador and transiting through Nicaragua: is that the question?

Mr. COLEMAN of Missouri. Right. Is that true today? Because I see there is nothing in the report.

Mr. BOLAND. That is true today, as it was at the time of that report. The evidence is less concrete, more circumstantial, but it still supports that conclusion. We have never backed away from that statement.

Mr. COLEMAN of Missouri. That is fine. Let me ask another question, and I appreciate it. I only have a certain amount of time.

Another statement which was made with great certainty by the committee in May 1983 was that the Salvadoran insurgents rely on the use of its sites in Nicaragua, some of which are located in Managua itself, for communications, command and control, and for the logistics to conduct their financial, material, and propaganda activities.

Is that true today?

Mr. BOLAND. That was true in 1983 and it is true today. My answer would be yes.

Mr. COLEMAN of Missouri. Along the same lines, Mr. Chairman, with certainty the committee stated that the Sandinista leadership sanctions and directly facilitates all of these functions. And, further, Nicaragua provides a range of other support activities, including secure transit of insurgents to and from Cuba, and assistance to the insurgents in planning their activities in El Salvador.

Is that true today also?

Mr. BOLAND. It was true then. It is true today. And the committee has never backed away from that statement.

Mr. COLEMAN of Missouri. As I recall also in the report the committee suggested we set up radar or sensing barriers in between Nicaragua and El Salvador. I was wondering if the chairman could give me an update on the radar that they suggested and the sensing that they suggested as an alternative to the interdiction of arms through covert activities.

Would the chairman give an update on the radar and the fencing that you suggested in May 1983?

Mr. BOLAND. As the gentleman knows, the whole basis of the war in Nicaragua and the flow of arms into El Salvador from Nicaragua, was originally arms interdiction. That has been the nub of the whole question since this war started. But let me respond to the gentleman and let me indicate to him that there has been little or no interdiction of arms by anyone into El Salvador.

Mr. COLEMAN of Missouri. Has there been any radar?

Mr. BOLAND. Let me also say to the gentleman that the administration opposed any arms interdiction program in H.R. 2760, but this is also an area that we can take care of in the 2-hour debate on section 107. And I will not respond to any more questions of the gentleman. He can wait until we get into section 107.

Mr. COLEMAN of Missouri. It is my time. I do not understand. It is my time that we are eating up and using up and the chairman will not respond to my questions. I do not recall in my 8 years that the chairman has refused to answer questions when it is on our time on such an important issue.

My question is has anybody requested the radar, has anybody requested funding for fencing? Where are the fences? Where is the radar?

That is all I want to know, because there is nothing in the report today or in this thin public document that says anything about section 107 except no funds shall be used period. I just want to know what happened.

Mr. BOLAND. If the gentleman will yield I will be happy to answer.

It is the judgment of the majority of the members of this committee that this has been a senseless war in Nicaragua, and they have witnessed little or no emphasis by the administration to the interdiction of arms into El Salvador. Their attention has been paid instead to an insurgency committed to the overthrow of the Sandinista government. That is my response.

. . . .

Annex 45

REPORT OF THE NATIONAL BIPARTISAN COMMISSION ON CENTRAL AMERICA, 10 JANUARY 1984 (EXCERPTS)

[Not reproduced]

Annex 46

"NICARAGUAN BARES PLAN TO DISCREDIT FOES", *WASHINGTON POST*, 19 JUNE 1983

[Not reproduced]

Annex 47

"BASES FOR FERRYING ARMS TO EL SALVADOR FOUND IN NICARAGUA", *WASHINGTON POST*, 21 SEPTEMBER 1983

[Not reproduced]

Annex 48

"CUBA DIRECTS SALVADOR INSURGENCY, FORMER GUERRILLA LIEUTENANT SAYS", *NEW YORK TIMES*, 28 JULY 1983

[Not reproduced]

Annex 49

"SALVADOR REBELS STILL SAID TO GET NICARAGUAN AID", *NEW YORK TIMES*, 11 APRIL 1984

"A FORMER SALVADORAN REBEL CHIEF TELLS OF ARMS FROM NICARAGUA", *NEW YORK TIMES*, 12 JULY 1984

[Not reproduced]

Annex 50

UNITED STATES DEPARTMENT OF STATE, COMMUNIST INTERFERENCE IN EL SALVADOR, SPECIAL REPORT NO. 80, 23 FEBRUARY 1981

SUMMARY

This special report presents definitive evidence of the clandestine military support given by the Soviet Union, Cuba, and their Communist allies to Marxist-Leninist guerrillas now fighting to overthrow the established Government of El Salvador. The evidence, drawn from captured guerrilla documents and war materiel and corroborated by intelligence reports, underscores the central role played by Cuba and other Communist countries beginning in 1979 in the political unification, military direction, and arming of insurgent forces in El Salvador.

From the documents it is possible to reconstruct chronologically the key stages in the growth of the Communist involvement:

The direct tutelary role played by Fidel Castro and the Cuban Government in late 1979 and early 1980 in bringing the diverse Salvadoran guerrilla factions into a unified front;

The assistance and advice given the guerrillas in planning their military operations;

The series of contacts between Salvadoran Communist leaders and key officials of several Communist states that resulted in commitments to supply the insurgents nearly 800 tons of the most modern weapons and equipment;

The covert delivery to El Salvador of nearly 200 tons of those arms, mostly through Cuba and Nicaragua, in preparation for the guerrillas' failed "general offensive" of January 1981;

The major Communist effort to "cover" their involvement by providing mostly arms of Western manufacture.

It is clear that over the past year the insurgency in El Salvador has been progressively transformed into another case of indirect armed aggression against a small Third World country by Communist powers acting through Cuba.

The United States considers it of great importance that the American people and the world community be aware of the gravity of the actions of Cuba, the Soviet Union, and other Communist states who are carrying out what is clearly shown to be a well-coordinated, covert effort to bring about the overthrow of El Salvador's established government and to impose in its place a Communist régime with no popular support.

I. A Case of Communist Military Involvement in the Third World

The situation in El Salvador presents a strikingly familiar case of Soviet, Cuban, and other Communist military involvement in a politically troubled Third World country. By providing arms, training, and direction to a local insurgency and by supporting it with a global propaganda campaign, the Communists have intensified and widened the conflict, greatly increased the suffering of the Salvadoran people, and deceived much of the world about the true nature of the revolution. Their objective in El Salvador as elsewhere is to bring about — at little cost to themselves — the overthrow of the established government and the imposition of a Communist régime in defiance of the will of the Salvadoran people.

The Guerrillas: their Tactics and Propaganda. El Salvador's extreme left, which includes the long-established Communist Party of El Salvador (PCES) and several armed groups of more recent origin, has become increasingly committed since 1976 to a military solution. A campaign of terrorism — bombings, assassinations, kidnappings, and seizures of embassies — has disrupted national life and claimed the lives of many innocent people.

During 1980, previously fragmented factions of the extreme left agreed to coordinate their actions in support of a joint military battle plan developed with Cuban assistance. As a precondition for large-scale Cuban aid, Salvadoran guerrilla leaders, meeting in Havana in May, formed first the Unified Revolutionary Directorate (DRU) as their central executive arm for political and military planning and, in late 1980, the Farabundo Martí People's Liberation Front (FMLN), as the coordinating body of the guerrilla organizations. A front organization, the Revolutionary Democratic Front (FDR), was also created to disseminate propaganda abroad. For appearances sake, three small non-Marxist-Leninist political parties were brought into the front, though they have no representation in the DRU.

The Salvadoran guerrillas, speaking through the FDR, have managed to deceive many about what is happening in El Salvador. They have been aided by Nicaragua and by the worldwide propaganda networks of Cuba, the Soviet Union, and other Communist countries.

The guerrillas' propaganda aims at legitimizing their violence and concealing the Communist aid that makes it possible. Other key aims are to discredit the Salvadoran Government, to misrepresent U.S. policies and actions, and to foster the impression of overwhelming popular support for the revolutionary movement.

Examples of the more extreme claims of their propaganda apparatus — echoed by Cuban, Soviet, and Nicaraguan media — are:

That the United States has military bases and several hundred troops in El Salvador (in fact, the United States has no bases and fewer than 50 military personnel there);

That the government's security forces were responsible for most of the 10,000 killings that occurred in 1980 (in their own reports in 1980, the guerrillas themselves claimed the killings of nearly 6,000 persons, including noncombatant "informers" as well as government authorities and military).

In addition to media propaganda, Cuba and the Soviet Union promote the insurgent cause at international forums, with individual governments, and among foreign opinion leaders. Cuba has an efficient network for introducing and promoting representatives of the Salvadoran left all over the world. Havana and Moscow also bring indirect pressure on some governments to support the Salvadoran revolutionaries by mobilizing local Communist groups.

II. Communist Military Intervention: A Chronology

Before September 1980 the diverse guerrilla groups in El Salvador were ill-coordinated and ill-equipped, armed with pistols and a varied assortment of hunting rifles and shotguns. At that time the insurgents acquired weapons predominantly through purchases on the international market and from dealers who participated in the supply of arms to the Sandinistas in Nicaragua.

By January 1981 when the guerrillas launched their "general offensive," they had acquired an impressive array of modern weapons and supporting equipment never before used in El Salvador by either the insurgents or the military. Belgian FAL rifles, German G-3 rifles, U.S. M-1, M-16, and AR-15 semiautomatic and automatic rifles, and the Israeli UZI, submachinegun and Galil assault rifle have all been confirmed in the guerrilla inventory. In addition, they are known to possess .30 to .50 caliber machineguns, the U.S. M-60 machinegun, U.S. and Russian hand grenades, the U.S. M-79 and Chinese RPG grenade launchers, and the U.S. M-72 light antitank weapon and 81 mm mortars. Captured ammunition indicates the guerrillas probably possess 60 mm and 82 mm mortars and 57 mm and 75 mm recoilless rifles.

Recently acquired evidence has enabled us to reconstruct the central role played by Cuba, other Communist countries, and several radical states in the political unification and military direction of insurgent forces in El Salvador and in equipping them in less than 6 months with a panoply of modern weapons that enabled the guerrillas to launch a well-armed offensive.

This information, which we consider incontrovertible, has been acquired over the past year. Many key details, however, have fallen into place as the result of the guerrillas' own records. Two particularly important document caches were recovered from the Communist Party of El Salvador in November 1980 and from the Peoples' Revolutionary Army (ERP) in January 1981. This mass of captured documents includes battle plans, letters, and reports of meetings and travels, some written in cryptic language and using code words.

When deciphered and verified against evidence from other intelligence sources, the documents bring to light the chain of events leading to the guerrillas' January 1981 offensive. What emerges is a highly disturbing pattern of parallel and coordinated action by a number of Communist and some radical countries bent on imposing a military solution.

The Cuban and Communist role in preparing for and helping to organize the abortive "general offensive" early this year is spelled out in the following chronology based on the contents of captured documents and other sources.

Initial Steps. The chronology of external support begins at the end of 1979. With salutations of "brotherly and revolutionary greetings" on December 16, 1979, members of the Communist Party of El Salvador (PCES), National Resistance (FARN), and Popular Liberation Forces (FPL) thank Fidel Castro in a letter for his help and "the help of your party comrades . . . by signing an agreement which establishes very solid bases upon which we begin . . .

At an . . . meeting at the Hungarian Embassy in Mexico City, guerrilla leaders made certain "requests" (possibly for arms). Present at this meeting were representatives of the German Democratic Republic, Bulgaria, Poland, Vietnam, Hungary, Cuba, and the Soviet Union.

In notes taken during an April 28, 1980, meeting of the Salvadoran Communist Party, party leader Shafik Handal mentions the need to "speed up reorganization and put the Party on a war footing". He added, "I'm in agreement with taking advantage of the possibilities of assistance from the socialist camp. I think that their attitude is magnificent. We are not yet taking advantage of it." In reference to a unification of the armed movement, he asserts that "the idea of involving everyone in the area has already been suggested to Fidel himself". Handal alludes to the concept of unification and notes, "Fidel thought well of the idea".

Guerrilla Contacts in Havana. From May 5 to June 8, 1980, Salvadoran guerrilla leaders report on meetings in Honduras, Guatemala, Costa Rica, and Nicaragua. They proceed to Havana and meet several times with Fidel Castro; the documents also note an interview with the German Democratic Republic

(G.D.R.) Chairman Erich Honecker in Havana. During the Havana portion of their travels, the Salvadoran guerrilla leadership meets twice with the Cuban Directorate of Special Operations (DOE, the clandestine operations special forces unit of the Cuban Ministry of Interior) to discuss guerrilla military plans. In addition, they meet with the Cuban "Chief of Communications".

During this period (late May 1980), the Popular Revolutionary Army (ERP) is admitted into the guerrilla coalition after negotiations in Havana. The coalition then assumes the name of the Unified Revolutionary Directorate (DRU) and meets with Fidel Castro on three occasions.

After the Havana meetings, Shafik Handal leaves Havana on May 30, 1980, for Moscow. The other Salvadoran guerrilla leaders in Havana leave for Managua. During the visit of early June, the DRU leaders meet with Nicaraguan revolutionary leaders (Sandinistas) and discuss: (1) a headquarters with "all measures of security", (2) an "international field of operations, which they (Sandinistas) control", and (3) the willingness of the Sandinistas to "contribute in material terms" and to adopt "the cause of El Salvador as its own". The meeting culminated with "dinner at Humberto's house" (presumably Sandinista leader Humberto Ortega).

Salvadoran Communist Party Leader's Travels in the East. From June 2 to July 22, 1980, Shafik Handal visits the U.S.S.R., Vietnam, the German Democratic Republic, Czechoslovakia, Bulgaria, Hungary, and Ethiopia to procure arms and seek support for the movement.

On June 2, 1980, Handal meets in Moscow with Mikhail Kudachkin, Deputy Chief of the Latin American Section of the Foreign Relations Department of the CPSU Central Committee. Kudachkin suggests that Handal travel to Vietnam to seek arms and offers to pay for Handal's trip.

Continuing his travels between June 9 and 15, Handal visits Vietnam where he is received by Le Duan, Secretary General of the Vietnamese Communist Party; Xuan Thuy, member of the Communist Party Central Committee Secretariat; and Vice Minister of National Defense Tran Van Quang. The Vietnamese, as a "first contribution", agree to provide 60 tons of arms. Handal adds that "the comrade requested air transport from the USSR".

From June 19 to June 24, 1980, Handal visits the German Democratic Republic (G.D.R.), where he is received by Hermann Axen, member of the G.D.R. Politburo. Axen states that the G.D.R. has already sent 1.9 tons of supplies to Managua. On July 21, G.D.R. leader Honecker writes the G.D.R. Embassy in Moscow that additional supplies will be sent and that the German Democratic Republic will provide military training, particularly in clandestine operations. The G.D.R. telegram adds that although Berlin possesses no Western-manufactured weapons — which the Salvadoran guerrillas are seeking — efforts will be undertaken to find a "solution to this problem". (*Note:* The emphasis on Western arms reflects the desire to maintain plausible denial.)

From June 24-27, 1980, Handal visits Czechoslovakia where he is received by Vasil Bilak, Second Secretary of the Czech Communist Party. Bilak says that some Czech arms circulating in the world market will be provided so that these arms will not be traced back to Czechoslovakia as the donor country. Transportation will be coordinated with the German Democratic Republic.

Handal proceeds to Bulgaria from June 27 to June 30, 1980. He is received by Dimitir Stanichev, member of the Central Committee Secretariat. The Bulgarians agree to supply German-origin weapons and other supplies, again in an apparent effort to conceal their sources.

In Hungary, from June 30 to July 3, 1980, Handal is received by Communist Party General Secretary Janos Kadar and "Guesel" (probably Central Committee

Secretary for Foreign Affairs Andras Gyenes). The latter offers radios and other supplies and indicates Hungarian willingness to trade arms with Ethiopia or Angola in order to obtain Western-origin arms for the Salvadoran guerrillas. "Guesel" promises to resolve the trade with the Ethiopians and Angolans himself, "since we want to be a part of providing this aid". Additionally, Handal secures the promise of 10,000 uniforms to be made by the Hungarians according to Handal's specifications.

Handal then travels to Ethiopia, July 3 to July 6. He meets Chairman Mengistu and receives "a warm reception". Mengistu offers "several thousand weapons", including: 150 Thompson sub-machine guns with 300 cartridge clips, 1,500 M-1 rifles, 1,000 M-14 rifles, and ammunition for these weapons. In addition, the Ethiopians agree to supply all necessary spare parts for these arms.

Handal returns to Moscow on July 22, 1980, and is received again by Mikhail Kudachkin. The Soviet official asks if 30 Communist youth currently studying in the U.S.S.R. could take part in the war in El Salvador. Before leaving Moscow, Handal receives assurances that the Soviets agree in principle to transport the Vietnamese arms.

Further Contacts in Nicaragua. On July 13, representatives of the DRU arrive in Managua amidst preparations for the first anniversary celebration of Somoza's overthrow. The DRU leaders wait until July 23 to meet with "Comrade Bayardo" (presumably Bayardo Arce, member of the Sandinista Directorate). They complain that the Sandinistas appear to be restricting their access to visiting world dignitaries and demanding that all contacts be cleared through them. During the meeting, Arce promises ammunition to the guerrillas and arranges a meeting for them with the Sandinista "Military Commission". Arce indicates that, since the guerrillas will receive some arms manufactured by the Communist countries, the Sandinista Army (EPS) will consider absorbing some of these weapons and providing to the Salvadorans Western-manufactured arms held by the EPS in exchange. (In January 1981 the Popular Sandinista Army indeed switched from using U.S.-made weapons to those of Soviet and East European origin.)

The DRU representatives also meet with visiting Palestine Liberation Organization (PLO) leader Yasir Arafat in Managua on July 22, 1980. Arafat promises military equipment, including arms and aircraft. (A Salvadoran guerrilla leader met with FATAH leaders in Beirut in August and November, and the PLO has trained selected Salvadorans in the Near East and in Nicaragua.)

On July 27, the guerrilla General Staff delegation departs from Managua for Havana, where Cuban "specialists" add final touches to the military plans formulated during the May meetings in Havana.

Arms Deliveries Begin. In mid-August 1980, Shafik Handal's arms-shopping expedition begins to bear fruit. On August 15, 1980, Ethiopian arms depart for Cuba. Three weeks later the 60 tons of captured U.S. arms sent from Vietnam are scheduled to arrive in Cuba.

As a result of a Salvadoran delegation's trip to Iraq earlier in the year, the guerrillas received a $500,000 logistics donation. The funds are distributed to the Sandinistas in Nicaragua and within El Salvador.

By mid-September, substantial quantities of the arms promised to Handal are well on the way to Cuba and Nicaragua. The guerrilla logistics coordinator in Nicaragua informs his Joint General Staff on September 26 that 130 tons of arms and other military materiel supplied by the Communist countries have arrived in Nicaragua for shipment to El Salvador. According to the captured documents, this represents one-sixth of the commitments to the guerrillas by the Communist countries. (*Note:* To get an idea of the magnitude of this commitment, the Vietnamese offer of only 60 tons included 2 million rifle and machinegun bullets, 14,500 mortar shells, 1,620 rifles, 210 machineguns, 48 mortars, 12 rocket launchers, and 192 pistols.)

In September and October, the number of flights to Nicaragua from Cuba increased sharply. These flights had the capacity to transport several hundred tons of cargo.

At the end of September, despite appeals from the guerrillas, the Sandinistas suspend their weapons deliveries to El Salvador for 1 month, after the U.S. Government lodges a protest to Nicaragua on the arms trafficking.

When the shipments resume in October, as much as 120 tons of weapons and materiel are still in Nicaragua and some 300-400 tons are in Cuba. Because of the difficulty of moving such large quantities overland, Nicaragua — with Cuban support — begins airlifting arms from Nicaragua into El Salvador. In November, about 2.5 tons of arms are delivered by air before accidents force a brief halt in the airlift.

In December, Salvadoran guerrillas, encouraged by Cuba, begin plans for a general offensive in early 1981. To provide the increased support necessary, the Sandinistas revive the airlift into El Salvador. Salvadoran insurgents protest that they cannot absorb the increased flow of arms, but guerrilla liaison members in Managua urge them to increase their efforts as several East European nations are providing unprecedented assistance.

A revolutionary radio station — *Radio Liberacion* — operating in Nicaragua begins broadcasting to El Salvador on December 15, 1980. It exhorts the populace to mount a massive insurrection against the government. (References to the Sandinistas sharing the expenses of a revolutionary radio station appear in the captured documents.)

On January 24, 1981, a Cessna from Nicaragua crashes on takeoff in El Salvador after unloading passengers and possibly weapons. A second plane is strafed by the Salvadoran Air Force, and the pilot and numerous weapons are captured. The pilot admits to being an employee of the Nicaraguan national airline and concedes that the flight originated from Sandino International Airport in Managua. He further admits to flying two earlier arms deliveries.

Air supply is playing a key role, but infiltration by land and sea also continues. Small launches operating out of several Nicaraguan Pacific ports traverse the Gulf of Fonseca at night, carrying arms, ammunition, and personnel. During the general offensive on January 13, several dozen well-armed guerrillas landed on El Salvador's southeastern coast on the Gulf of Fonseca, adjacent to Nicaragua.

Overland arms shipments also continue through Honduras from Nicaragua and Costa Rica. In late January, Honduran security forces uncover an arms infiltration operation run by Salvadorans working through Nicaragua and directed by Cubans. In this operation, a trailer truck is discovered carrying weapons and ammunition destined for Salvadoran guerrillas. Weapons include 100 U.S. M-16 rifles and 81 mm mortar ammunition. These arms are a portion of the Vietnamese shipment: A trace of the M-16s reveals that several of them were shipped to U.S. units in Vietnam where they were captured or left behind. Using this network, perhaps five truckloads of arms may have reached the Salvadoran guerrillas.

The availability of weapons and materiel significantly increases the military capabilities of the Salvadoran insurgents. While attacks raged throughout the country during the "general offensive" that began on January 10, it soon became clear that the DRU could not sustain the level of violence without suffering costly losses in personnel. By the end of January, DRU leaders apparently decided to avoid direct confrontation with government forces and reverted to sporadic guerrilla terrorist tactics that would reduce the possibility of suffering heavy casualties.

III. The Government: the Search for Order and Democracy

Central America's smallest and most densely populated country is El Salvador. Since its independence in 1821, the country has experienced chronic political instability and repression, widespread poverty, and concentration of wealth and power in the hands of a few families. Although considerable economic progress took place in the 1960s, the political system remained in the hands of a traditional economic elite backed by the military. During the 1970s, both the legitimate grievances of the poor and landless and the growing aspirations of the expanding middle classes met increasingly with repression. El Salvador has long been a violent country with political, economic, and personal disputes often resulting in murders.

The Present Government. Aware of the need for change and alarmed by the prospect of Nicaragua-like chaos, progressive Salvadoran military officers and civilians overthrew the authoritarian regime of General Carlos Humberto Romero in October 1979 and ousted nearly 100 conservative senior officers.

After an initial period of instability, the new government stabilized around a coalition that includes military participants in the October 1979 coup, the Christian Democratic Party, and independent civilians. Since March 1980, this coalition has begun broad social changes: conversion of large estates into peasant cooperatives, distribution of land to tenant farmers, and nationalization of foreign trade and banking.

Four Marxist-Leninist guerrilla groups are using violence and terrorism against the Salvadoran Government and its reforms. Three small non-Marxist-Leninist political parties — including a Social Democratic Party — work with guerrilla organizations and their political fronts through the Democratic Revolutionary Front (FDR), most of whose activities take place outside El Salvador.

The Government of El Salvador — headed since last December by José Napoleón Duarte, the respected Christian Democrat denied office by the military in the Presidential elections of 1972 — faces armed opposition from the extreme right as well as from the left. Exploiting their traditional ties to the security forces and the tendency of some members of the security forces to abuse their authority, some wealthy Salvadorans affected by the Duarte government's reforms have sponsored terrorist activities against supporters of the agrarian and banking reforms and against the government itself.

A symbiotic relationship has developed between the terrorism practised by extremists of both left and right. Thousands have died without regard to class, creed, nationality, or politics. Brutal and still unexplained murders in December of four American churchwomen — and in January of two American trade unionists — added U.S. citizens to the toll of this tragic violence. The United States has made clear its interest in a complete investigation of these killings and the punishment of those responsible.

Despite bitter resistance from right and left, the Duarte government has stuck to its reform programs and has adopted emergency measures to ease the lot of the poor through public works, housing projects, and aid to marginal communities. On the political front, it has offered amnesty to its opponents, scheduled elections for a constituent assembly in 1982, and pledged to hand power over to a popularly elected government no later than mid-1983.

The government's pursuit of progress with order has been further hampered by the virtual breakdown of the law enforcement and judicial system and by the lack of an effective civil service.

The introduction of the reforms — some of which are now clearly irreversible — has reduced popular support for those who argue that change can only come about through violence. Few Salvadorans participate in antigovernment demonstrations. Repeated calls by the guerrillas for general strikes in mid- and late-1980 went unheeded. The Duarte government, moreover, has made clear its willingness to negotiate the terms of future political processes with democratic members of all opposition forces — most notably, by accepting the offer of El Salvador's Council of Bishops to mediate between the government and the Democratic Revolutionary Front.

In sum, the Duarte government is working hard and with some success to deal with the serious political, social, and economic problems that most concern the people of El Salvador.

U.S. Support. In its commitment to reform and democracy, the Government of El Salvador has had the political support of the United States ever since the October 1979 revolution. Because we give primary emphasis to helping the people of El Salvador, most of our assistance has been economic. In 1980, the United States provided nearly $56 million in aid, aimed at easing the conditions that underlie unrest and extremism. This assistance has helped create jobs, feed the hungry, improve health and housing and education, and support the reforms that are opening and modernizing El Salvador's economy. The United States will continue to work with the Salvadoran Government toward economic betterment, social justice, and peace.

Because the solution in El Salvador should be of the Salvadorans' own making and nonviolent, the United States has carefully limited its military support. In January, mounting evidence of Communist involvement compelled President Carter to authorize a resupply of weapons and ammunition to El Salvador — the first provision of lethal items since 1977.

IV. Some Conclusions

The foregoing record leaves little doubt that the Salvadoran insurgency has become the object of a large-scale commitment by Communist states outside Latin America.

The political direction, organization, and arming of the insurgency is coordinated and heavily influenced by Cuba — with active support of the Soviet Union, East Germany, Vietnam and other Communist states.

The massing and delivery of arms to the Salvadoran guerrillas by those states must be judged against the fact that from 1977 until January 1981 the United States provided no weapons or ammunition to the Salvadoran Armed Forces.

A major effort has been made to provide "cover" for this operation by supplying arms of Western manufacture and by supporting a front organization known as the Democratic Revolutionary Front to seek non-Communist political support through propaganda.

Although some non-Communist states have also provided material support, the organization and delivery of this assistance, like the overwhelming mass of arms, are in the hands of Communist-controlled networks.

In short, over the past year, the insurgency in El Salvador has been progressively transformed into a textbook case of indirect armed aggression by Communist powers through Cuba.

Annex 51

INTERVIEW WITH PRESIDENT MAGANA, *ABC* (MADRID), 22 DECEMBER 1983

(Excerpts) (Passage omitted) *Question:* When are the next Presidential elections scheduled to take place?

Answer: On 25 March.

Question: Is there any chance at any of the rival parties gaining a majority?

Answer: I believe it is very unlikely, very unlikely. I believe that the political proportions in the March 1984 Presidential elections will not substantially alter the results of the 1982 Constitutional elections.

Question: That means that the Christian Democrats will come first, next the ARENA, or the Extreme Right; while the conflicting *(illegible)* and fourth-placed parties (National Conciliation Party and Democratic Action) will play a major role in the second round of elections, depending on whether they ally with the winner or the runner-up. Mr. President, in your opinion, is my interpretation correct?

Answer: I believe that the country is tired of the usual protagonists. I do not know, I cannot say anything about it.

Question: I understand that the parties that came third and fourth in the last elections have very charismatic leaders.

Answer: Yes, I believe that their leaders are very responsible.

Question: The current Minister of the Presidency is standing for the National Conciliation Party. Today's newspapers announced his official candidacy. If you had any advice to give him, what would it be?

Answer: Let him choose someone "apolitical" as his deputy President — a professional man with prestige, not involved in recent turbulent political events.

Question: Will you not be standing for re-election, Mr. President?

Answer: No. (Passage omitted.)

Question: Mr. President, how do the guerrillas supply themselves and where from?

Answer: Be sure of this: from Nicaragua, and only from Nicaragua. In the past two weeks we have detected 68 incursions by aircraft which parachuted equipment, weapons and ammunition into the Morazan area, which is where the guerrillas are most concentrated. I will reveal to you something that may surprise you: my profound admiration for a particular quality of the subversive guerrillas and their protectors, namely, the art of distorting the truth and finding an audience (even in pro-Western, not pro-Soviet, countries) to heed them and believe them. It is an incredible quality which one can only admire. They are masters of propaganda; they are artists in the manipulation of facts — true masters of the art of using lies.

Question: I would remind you, Mr. President, that one of Lenin's maxims was: "Against eddies, violence; against souls, lies."

Answer: Well, they have learned the lesson very well. While Managua draws the world's attention by claiming for the past two years that it is about to be invaded, they have not ceased for one moment to invade our country. There is only one point of departure for the armed subversion, Nicaragua.

Question: Mr. President, has there been any attempt to establish contacts with the guerrillas, to incorporate them in the country's democratic process, as Venezuela successfully tried to do in past decades?

Answer: I find your question very interesting because I personally have tried to do it twice.

Question: On Salvadoran territory?

Answer: No, on Colombian territory. I asked President Betancur of Colombia to act as mediator for me, to attempt a reconciliation. I did not succeed.

Question: I sometimes think, Mr. Magana, that, if it had wanted to, the United States could long ago have ended this latent war and that you receive US aid little by little.

Answer: President Carter's policy was one of absolute blindness and incomprehension. No, things have changed. Nevertheless, when, sometimes, we ask for specific assistance (four helicopters, for instance) to evacuate a hill taken by the rebels or to combat a newly-discovered infiltration, they take six months to send us it. I believe that this will change now and that the United States will step up its aid, but not only with the aim of ridding us of this scourge of armed subversion, which has been going on for four years, but also because of its repercussions on the US public for President Reagan's re-election, especially in the light of his rise in popularity following the intervention on Grenada (passage omitted).

Annex 52

INAUGURAL ADDRESS OF PRESIDENT NAPOLEÓN DUARTE, SAN SALVADOR, 1 JUNE 1984, *FOREIGN BROADCAST INFORMATION SERVICE*, 4 JUNE 1984

[Inauguration address delivered by President José Napoleón Duarte at the Sports Palace in San Salvador — live.]

. . . .

Salvadorans, we must bravely, frankly and realistically acknowledge the fact that our homeland is immersed in an armed conflict that affects each and every one of us; that this armed conflict has gone beyond our borders and has become a focal point in the struggle between the big world power blocs. With the aid of Marxist governments like Nicaragua, Cuba and the Soviet Union, an army has been trained and armed and has invaded our homeland.

Its actions are directed from abroad. Armed with the most sophisticated weapons, the Marxist forces harass our Armed Forces and constantly carry out actions intended to destroy our economy, with the loss of countless human lives and the suffering of hundreds of thousands of Salvadorans. For its part, our Army has been considerably enlarged, it has received better training, and it is imbued with a profound patriotic commitment to defend the people and to keep us from falling into the hands of Marxist subversion, which seeks to establish a totalitarian dictatorship in our homeland.

In the face of these realities, many Salvadorans have wondered why our Armed Forces have not yet managed to defeat the guerrillas. Many foreigners ask themselves the same question. Others, overwhelmed by international Marxist propaganda, wonder why the guerrillas have not yet managed to seize the country. The response to this is very simple: It has been clearly seen that the immense majority of the people have chosen the democratic solution by means of the vote, and this obviously makes it impossible for the guerrillas to seize the country. Then there is another truth. This is that many of we Salvadorans view the conflict as spectators, concerned only about our own interests, without contributing to the economic recovery, our national defense, or the solution of our social conflicts. This is the gist of the matter. So far, the people have rejected the violence and the war, but have not taken dynamic action, alongside the Armed Forces, to defend democracy, even though the situation has changed drastically. This is why it is important to point out our position on dialogue and the negotiation.

. . . .

This achievement, which was well explained by President Magana, contrasts with the subjugation that leftist political sectors find themselves in with regard to the military guerrilla sector. The truth is that they have fallen under the authority of the guerrilla commanders, whom they must obey, and have not demonstrated so far that they are the leaders of the subversive movement. For this reason, to achieve credibility, they must demonstrate their authority over the armed sector, because in this way, any decision like that made by the subversive groups in Colombia would be heeded by the entire subversive movement. This would be an important signal, and one which the entire nation and all of our people expect, so that dialogue is not held with weapons on the table, but serves instead to find the political paths [applause] necessary to bring all Salvadorans into the democratic process. Since this is of momentous importance, allow me to repeat this: This would be an important signal, and one which the entire nation expects, so that dialogue is not held with weapons on the table, but serves instead to find the political paths to bring all Salvadorans into the democratic process [applause].

For its part, my Government will make efforts to promote a climate of security and confidence that will permit us, as a prior step, to begin as soon as possible a national dialogue among all democratic forces and majority sectors so that together we can draw up a formula of peace that will be the faithful reflection of the real feelings of the Salvadoran people and that will be vigorously supported so that no one can doubt that such a formula is a genuine decision and an expression of the will of all of the people and that should be turned into a common, energetic and supreme effort capable of overcoming all obstacles and of achieving the great objective of peace. For this purpose, we will appeal to the law, international solidarity, patriotic responsibility and, when circumstances demand, to the legitimate right of defense.

. . . .

Annex 53

PRESS CONFERENCE WITH PRESIDENT DUARTE (SAN SALVADOR), 27 JULY 1984, *FOREIGN BROADCAST INFORMATION SERVICE*, 30 JULY 1984

[President José Napoleón Duarte Press Conference in Government House in San Salvador — live.]

[Excerpts] */Beltran/* Raul Beltran, reporter for YSKL and VOA. Mr. President, some right-wing [as heard] sectors and their followers in our country are displeased because the Government has refused to admit that because of pressure from some organizations in El Salvador, particularly right-wing or conservative organizations, it decided not to send a delegation to the commemoration of the fifth anniversary of the Nicaraguan revolution. Could you give us your opinion on this issue? Secondly, it has been said — and there are reports from high officials at the Central Reserve Bank and the Finance Ministry in this regard — that studies are hurriedly being undertaken on a possible devaluation of our currency. Could you please inform us personally about this?

[Duarte] Gladly. To begin with, let me state that I make political decisions in my capacity as President of the Republic. Before leaving, I decided not to send a delegation to Nicaragua for major political reasons.

When I arrived in Europe I found that Nicaragua, the FMLN-FDR, and the left wing had mounted a campaign specifically intended to prevent me from opening Europe's doors to an understanding of our problems. One of the things they did was to send Daniel Ortega to Europe a few days ahead of me. One of the points raised by Ortega at a given moment was that he had helped, is helping, and will continue to help the Salvadoran guerrillas. He placed himself in a position that showed that I am not the aggressor, and that it is he who is openly and directly attacking and intervening in our country. Therefore, at that moment, I wrote the message I sent to the Presidential House containing my order and the three steps that I suggested. First of all, I suspended the trip. There was no sense in making it, because all Europe realized that he was the aggressor and that it was he who was looking for conflicts and confrontation. Obviously, he has declared himself guilty of intervention. Secondly, I ordered that we lodge a formal protest with Nicaragua in this regard. Thirdly, I ordered that studies be made to submit a complaint to the International Court of Justice at The Hague about Nicaragua's intervention in El Salvador's affairs.

. . . .

[Gutierrez] José Arturo Gutierrez, of [word indistinct] of El Salvador. Mr. President: The guerrillas have announced that they will carry out a large-scale offensive in the next few days. My question is: Is there any plan to counteract this offensive, and what attitude should the Salvadoran people take, in your opinion? According to other reports, you are prepared to sign a peace agreement with Nicaragua, even though the Sandinists are supplying weapons to the Salvadoran guerrillas. If this is so, could you please tell us the (?basis) on which such an agreement would be signed?

[Duarte] First of all, let me state that the Armed Forces Joint Chiefs of Staff have drafted the necessary plans to guarantee the nation's security.

As for your second question [words indistinct], well, let me state that with respect to the supposed treaty with Nicaragua, your question obviously [Duarte changes thought] . . . the way you couched your question, it suggests that I would propose that a treaty be signed even though the Nicaraguans are sending weapons to El Salvador.

I wish to change the meaning of your question, because the statement I made in Europe is the very opposite of what you have suggested. A newsman there asked me if I would be willing to sign a treaty with Nicaragua, and I told him that, always provided it stopped its support for the guerrillas, stopped using subversion and exporting revolution to the rest of Central America, I would be willing to sign a treaty not only with Nicaragua but with any other country in the world that shows respect, as we do.

. . . .

[De Gracia] Agustin de Gracia, of ACAN-EFE. Mr. President: you have said that you oppose all types of violence and that you support the Contadora [words indistinct]. However, (?when you went to) Washington you supported, in some way, the assistance that was being requested from Congress for the Nicaraguan counterrevolution. Being in agreement with those principles presupposes a different Salvadoran policy on this issue. Could you tell me [words indistinct] the Contadora document?

[Duarte] [words indistinct] that is a good question. I will answer the question that you have raised. First, there is no inconsistency in my position on the Contras, and I will explain it once more. This is not the first time that I have done so. I cannot support the creation of or actions by guerrilla groups in other parts of the world, because this would mean supporting and justifying the concepts that the Marxists have postulated with regard to the Salvadoran guerrillas. Nicaragua has raised two concepts: self-determination of peoples, and solidarity. It is they who are inconsistent. Based on the principle of self-determination of peoples, they claim that no one can meddle in Nicaragua's affairs. But, with regard to the concept of solidarity, they say: We have the right to export revolution, to help and to show solidarity to guerrillas in other areas.

What I have said, from the Salvadoran standpoint, is that we have a problem of aggression by a nation called Nicaragua against El Salvador, that these gentlemen are sending in weapons, training people, transporting bullets and what not, and bringing all of that to El Salvador. I said that at this very minute they are using fishing boats as a disguise and are introducing weapons into El Salvador in boats at night.

In view of this situation, El Salvador must stop this somehow. The Contras, even though . . . thus, the Contras are creating a sort of barrier that prevents the Nicaraguans from continuing to send arms to El Salvador by land. What they have done instead is to send them by sea, and they are now getting them in through Monte Cristo, El Coco and El Espino. This is because they cannot do so overland, because the Contras are in those areas, in one way or another.

Therefore, you can see that these are two different concepts. My position is coherent. I defend my country. I have said that I do not want any weapons, ammunition or supplies of any kind to reach my country, to support guerrillas in my homeland, and that I am against anything that supports this type of action, either here or there. That is why I have told the Nicaraguans that I think El Salvador has always respected them and that, therefore, they must respect El Salvador.

[Block] Roberto Block, from Reuter news agency. Mr. President: (?Thank you). You have talked many times about Nicaragua's supply of weapons to the Salvadoran guerrillas, and you appeared at the Congress in your role as

(?President), as you say, to ask for weapons, for assistance, and to ask that the Contras in Nicaragua cut off this supply. I would like to know exactly what tangible evidence exists that Nicaragua is sending weapons to El Salvador. If such proof exists, why did you ask that statements be sent to The Hague, instead of the tangible evidence on these arms supplies from Nicaragua?

[Duarte] [Words indistinct] of trying to detract from the validity of a statement by a head of State? When a head of State confesses that he is helping guerrillas, he is helping the guerrillas. Therefore, what better evidence exists than a categorical statement by a head of State? Nothing is more powerful than the confession he made.

I said all of this to explain that the evidence does exist. There is evidence on all of the beaches. An overwhelming number of peasants claim that they have seen people enter with weapons, which they load on horses, and leave for the mountains. What you want is to see them for yourself. Well, I invite you to go to the beaches and watch, at night, how they unload the weapons. I am going to give you a specific place, Montecristo Island. They are constantly unloading weapons there. Caches have been found there. We are going to submit all of this evidence to the Court at The Hague when the time comes.

[Block] After $50 million [words indistinct] to the Contras by the United States, you are saying that the weapons are still arriving. Do you think, if the United States restores its assistance to the Contras, that all that . . .

[*Duarte* — interrupting] Let me tell you, I have never said what you are saying, Mr. Block. I have never said that assistance should be supplied to the Contras so that they could invade Nicaragua's territory. I never said that. I said that someone is doing that, and that what it does is prevent the weapons from reaching El Salvador. This is what I have said, and I reiterate it. I am not opposed to the prevention of weapons entering El Salvador. If by some action in the world these weapons are prevented from entering El Salvador, it is welcome, because this will rid us of the constant problem of so many deaths, murders and problems in our homeland. This is what must be prevented.

Forgive me, but being in agreement with a concept, with a principle, is one thing, and reality is another. And I am talking to you here about reality.

They have been unable to stop the flow of weapons. Doesn't this show you that the problem is much more profound than we imagine? How and from where do those weapons get here? The scheme they use is so sophisticated that it obviously renders the problem much more serious. One can't simply think about $50 million. If you take a look at the U.S. assistance [words indistinct], it is not $10 million, $20 million or $50 million. Their assistance to the world totals $70 billion. Why? Because the world is immersed in crisis.

. . . .

Annex 54

BROADCASTS, RADIO VENCEREMOS (FARABUNDO MARTÍ LIBERATION FRONT), *FOREIGN BROADCAST INFORMATION SERVICE*, JUNE-AUGUST 1984

VENCEREMOS ON CAMPAIGN AGAINST "WAR ECONOMY" (25 JUNE 1984)

[Excerpts] The policies of repression, terror, destruction, depopulation and economic strangulation carried out by the dictatorship's army have affected 38 percent of the country. More than 100 areas under government jurisdiction have suffered from these policies. In response to this, the Salvadoran people and its vanguard the FMLN have deepened the sabotage of the war economy, of the oligarch's economy, and have carried out the "Let Us Expand Sabotage and the People's War Against the Dictatorship's Terror in the Rural Areas" campaign.

(24 JULY 1984)

[Excerpts] On 28 June, the FMLN began the new nationwide "Long Live the Workers' Heroic Struggle, Let Us Defeat Duarte's Capitulation" campaign. This campaign is developing within the framework of the people's increasing struggle to secure their immediate goals and to weaken even further the U.S. plan that uses José Napoleón Duarte as a façade. In less than a month, the FMLN's various forces, its guerrilla and militia military units, have combined their constant actions, impeding the puppet Army's genocidal plans.

Attention, Salvadoran people. These are the results of our revolutionary actions. In 47 days of continuous military campaigns at the national level we have inflicted 1,100 casualties on the puppet Army. These include more than 16 officers, all trained by the U.S. military advisers. We also captured 115 prisoners of war, who have already been returned to their families. The dictatorship's loss of 1,100 dead and wounded in this period is equivalent to the loss of an entire battalion.

We are intensely striking at and weakening the dictatorship's Army. We are neutralizing the plan to increase the forces that are equipped by U.S. military advisers.

So far in our military campaign, the guerrilla army has seized more than 248 weapons, including 14 support weapons that include a 120-mm mortar. We repeat, in our military campaign, the FMLN guerrilla army has seized more than 248 weapons from the dictatorship, including 14 support weapons that include a 120-mm mortar. In this campaign, our guerrilla units have fought in new theaters of operation, carrying out an intense sabotage of the dictatorship's war economy, taking millions of dollars from it that were to be used to maintain its military machinery. We have sabotaged 56 electricity transformers, 54 of them at the Cerron Grande hydroelectric plant. We have sabotaged an electricity substation, a gasoline station, 3 locomotives, and more than 11 trucks and fuel tankers. We have destroyed four 120-mm mortars, one 105-mm cannon, one armored vehicle, and various military trucks. Three military trucks have been damaged. The garrison of a Cazadores Battalion has also been damaged by our revolutionary weapons.

All of these intense and general actions have caused a profound and hopeless erosion of the enemy's human and material resources, rendering it completely ineffective. The enemy Army has been unable to mount a single counteroffensive action that would permit it to substantially change the course of the war and the battles in this period. We have the tactical and strategic military initiative. The enemy plans drafted by the Yankee advisers and General John Vessey, chairman of the U.S. Joint Chiefs of Staff; General Paul Gorman, commander of the Southern Command; and Fred Ikle, the Pentagon's under secretary, are being destroyed by the continuous and general actions of our armed people. We greet the experienced fighters and chiefs of the FMLN's revolutionary armed forces.

VENCEREMOS REPORTS FMLN 1 AUG OPERATIONS (3 AUGUST 1984)

[Text] On the night of 1 August, militia units sabotaged 30 manzanas of cotton crops. The people's militia machetes trimmed 30 manzanas of cotton at the La Normandia farm in the jurisdiction of Jiquilisco, Usulutan Department. The militiamen's machetes are trimming the cotton of the wealthy. On Wednesday, 1 August, units from the Rafael Arce Zablah Brigade carried out the following activities at midnight: the destruction of a gas station located north of Milian's Motel on the Coastal Highway.

During this operation, a van parked at the gas station was set afire. Simultaneously on the same day our revolutionary units attacked enemy positions in the El Martillo Cotton Cooperative with rifles and RPG-2's, destroying a sentry post. Thus far, the number of casualties suffered by the enemy are unknown. During this operation, an agricultural tractor used for cotton production in (Las Plantas) canton, (Ochatlan) jurisdiction, Usulutan Department, was also destroyed. During the same operation, Milian's Motel was also occupied and partially destroyed because it was used as a hideout for the régime's death squads. The motel is located 2 km from the city of Usulutan.

EL SALVADOR

REBELS SABOTAGE ELECTRICITY IN THREE DEPARTMENTS (*EL MUNDO*, 7 AUGUST 1984)

[Excerpts] Chalatenango and other cities in northern Chalatenango, San Salvador and Cuscatlan Departments are without electricity today due to guerrilla actions in two sections of the Northern Trunk Highway. According to military reports, last night the guerrillas toppled power lines of the Lempa River Hydroelectric Executive Commission, CEL, rural distribution system. Official reports indicate that the towns and rural communities from El Paisnal to the northern areas of the previously mentioned departments were left without electric power from 1930 when extremist groups simultaneously destroyed CEL power posts by setting off dynamite charges toppling them onto the Northern Trunk Highway. It was reported that other guerrilla forces staged two attacks on Tutultepeque farm in the jurisdiction of Nejapa last night where there were no casualties or damage. A military source reported that the extremists staged the first attack at 2300, but they were repelled by volunteers of the civil defense of Aguilares who guard the farm. The second attack occurred an hour later but the extremists were also repelled.

Annex 55

UNITED STATES DEPARTMENT OF STATE, CONGRESSIONAL PRESENTATION, "SECURITY ASSISTANCE PROGRAMS", COSTA RICA, EL SALVADOR, HONDURAS, FY 1981-FY 1985

[Not reproduced]

Annex 56

United States Department of State, "El Salvador: Revolution or Reform?", Current Policy No. 546, February 1984

This publication is based on oral and written testimony delivered by Langhorne A. Motley, Assistant Secretary for Inter-American Affairs, before a joint hearing of the Subcommittees on Human Rights and International Organizations and on Western Hemisphere Affairs of the House Foreign Affairs Committee on January 26, 1984.

. . . .

SECURITY

These economic, political, and social developments have all occurred against a backdrop of intense guerrilla conflict.

Increased weaponry and better training have permitted the guerrillas to transform a large number of their support forces into active combatants. Guerrilla activities since 1980 do not indicate any expansion of their influence among the general population. Indeed, the guerrilla strategy of targeting the economy has hurt the poor the most and has cost the guerrillas popular support. Nevertheless, the guerrillas' training, communications, and armament have improved greatly. This and other evidence disputes recent claims that Cuba and Nicaragua may be reducing direct support for the Salvadoran guerrillas or closing off their command-and-control center in Managua.

An estimated 9,000-11,000 guerrillas are now actively engaged in the field against the Salvadoran Armed Forces. Over recent months, through continued training and access to arms, the Salvadoran guerrillas have managed to provide formerly noncombatant personnel with equipment for combat. While this has increased the number of people with arms, it is not a reflection of increased popular support, and the overall number of people involved in the guerrilla movement itself has not really grown. More of them are simply armed. Their strategy is based on hit-and-run tactics. They capitalize on the Salvadoran Armed Forces' need to protect static positions (cities, bridges, dams, etc.) while simultaneously waging an effective, mobile, offensive campaign.

The Salvadoran military has prevented the guerrillas from gaining and holding ground. Though the guerrillas can stage raids, they cannot remain in any position from which the Salvadoran military wishes to remove them. Nor have they been able to disrupt such key events as the annual harvest or national elections.

The Salvadoran military has significantly increased in size. U.S. training has increased. Nevertheless, a number of serious gaps exist. There are still too few U.S.-trained troops and the size of the Salvadoran officer corps is insufficient to lead the rapidly expanding army in time of war. The latter has been a particular problem for command and control, military discipline, staff functions, and the general management of the war.

U.S. ASSISTANCE

The Administration's original request to Congress for fiscal year (FY) 1984 for military and economic assistance totaled $282 million, of which some $260 million was approved under the Continuing Resolution. In the context of the global U.S. assistance effort, this amount is moderate both in view of the U.S. security interest in Central America and the turmoil and human suffering which our aid helps alleviate. The Administration's request for El Salvador is only about 3% of total U.S. assistance worldwide.

U.S. economic assistance has always far exceeded military assistance. In all but 1 year, economic aid has been at least three times the amount provided to assist the Salvadorans defend against guerrilla destruction.

U.S. economic assistance grew from $57.8 million in 1980 to more than $240 million in 1983. It is divided into three elements:

Economic support funds (ESF) to assist the Salvadorans to meet critical import needs, to finance their government's budget, and to pay for priority projects such as land reform and improved machinery for elections;

Development assistance to finance employment-generation projects and other social needs; and

PL-480 food donations to supplement shortages in basic dietary needs.

U.S. military assistance has been an important element in preventing a guerrilla victory. In addition to providing arms, ammunition, and logistical support, we have helped train more than 15,000 Salvadoran soldiers and officers in a variety of military subjects, including respect for human rights. By the end of 1983, 33% of U.S.-trained troops and 90% of eligible noncommissioned officers were reenlisting.

Congressionally approved assistance, however, has consistently been below the Administration's requested levels. For example, in FY 1984 the Administration requested $86.3 million; Congress, through its Continuing Resolution, provided $64.8 million for military assistance. And because 30% of this amount is withheld by law until a verdict is reached in the churchwomen's case, only some $45 million is available to address El Salvador's urgent security problems. Over $25 million of this $45 million has already been obligated, and requests for an additional $13 million are currently being processed. Funds will run out soon, possibly on the eve of elections.

CONCLUSION

The democratic alternative in El Salvador, though faced with powerful opposition from terrorists and guerrillas, has made steady progress since 1979 in building a new, more equitable society and a more democratic and responsive government. Our political support and our military and economic assistance have helped.

In line with the recommendations of the President's National Bipartisan Commission on Central America, we will continue to support the Salvadoran Government. Our moral and strategic interests coincide. In February 1984, we will follow up on the recommendations of the commission to request additional funds from Congress to address the economic, social, and security needs of El Salvador and the other countries of Central America.

Presidential elections are scheduled in El Salvador for March 1984. The Government of El Salvador, through its Peace Commission, has sought direct talks to encourage the guerrillas to participate in the balloting. The Peace Commission remains prepared to meet with the armed left and its political associates to discuss their participation in free elections, including physical security for candidates and access to the media. Elections for the Constituent

Assembly and local mayors will be held in 1985. The government is committed to continuing to try to bring the left into participation in these elections.

Nonetheless, there is every indication that the guerrillas will attempt to disrupt these moves toward democracy. It is, therefore, imperative that Congress provide the needed levels of military and economic aid. The commitment of Salvadorans of the democratic center, who are defying both the communist guerrillas and the violence of the reactionary right, clearly justifies the continued support of the United States.

Annex 57

COSTA RICAN MINISTRY OF FOREIGN RELATIONS AND WORSHIP, *LAS RELACIONES ENTRE COSTA RICA Y NICARAGUA (RELATIONS BETWEEN COSTA RICA AND NICARAGUA)*, 28 JULY 1982, ATTACHMENTS NOT PROVIDED (ENGLISH TRANSLATION PROVIDED)

Department of State, Division of Language Services

(Translation)

LS No. 113651
LM/JF/MM
Spanish.

Republic of Costa Rica
Ministry of Foreign Relations and Worship

RELATIONS BETWEEN COSTA RICA AND NICARAGUA

Report to the Diplomatic Missions Accredited to the Costa Rican Government

Mr. Ambassador:

Please bring the following information to the attention of your Government as soon as possible:

1. At 1.50 on July 27, 1982, Angel Edmundo Solano Calderón, Minister of Public Security, together with Francisco Tacsan Lam, Chief Clerk; Carlos Monge Quesada, Director, and Rodolfo Jiménez Montero, Assistant Director, of the Ministry of National Security, made an accusation to the *Agencia Sexta Fiscal* [Office of a Public Prosecutor] that Germán Pinzón Zora and Germán Altamirano Palacios had placed a powerful bomb in the central offices of the airline Servicios Aéreos Hondureños S.A. (SAHSA) on July 3, 1982, at approximately 12.30 a.m. (doc. 1).

2. The Office of National Security was able to arrest Germán Pinzón Zora, a Colombian national, who confessed to Attorney General José Roberto Steiner Acuña that he was responsible for that serious act of terrorism together with Germán Altamirano Palacios. According to that statement, the bomb planted in the SAHSA offices in San José was part of a plan to destabilize Costa Rica and discredit it internationally. The plan included operations to sabotage important facilities in Costa Rica, other terrorist acts, kidnappings, attacks on banks and acts against public institutions, agencies and companies of other Central American countries. According to the informant, the plan was devised and directed from Managua, Nicaragua, by Rafael Lacayo of the Nicaraguan Ministry of Interior.

3. On July 26, 1982, at 5.00 p.m. in front of the Mas X Menos Supermarket located in Escazú the accused Altamirano Palacios was arrested as he was making a contact with Pinzón Zora. As he was being arrested, Altamirano drew one of the two weapons that he was carrying and resisted, making abusive remarks to the authorities who proceeded to disarm him and take him to National Security

Headquarters. The accused Altamirano Palacios did not identify himself as a diplomat at the time of his arrest nor was he carrying any identification that would prove that he was a diplomat (doc. 1).

4. Yesterday morning [July 27, 1982] Oscar Ramón Téllez, the Nicaraguan Chargé d'Affaires, called the Costa Rican Foreign Ministry to request that Altamirano Palacios be released. The Minister of Foreign Affairs inquired about what had happened and was told that the *Ministerior Público* [Office of the Public Prosecutor], an office in the Judicial Branch, could not release Altamirano Palacios because he did not have any identification as a diplomat. Volio Jiménez, the Foreign Minister, immediately asked the Chief of the *Ministerio Público* to release the accused on the basis of the Vienna Convention on Diplomatic Relations and, to that end, he pointed out that Altamirano Palacios was accredited as an attaché at the Embassy of Nicaragua in Costa Rica. Altamirano Palacios was released during the afternoon (doc. 2).

5. In view of the seriousness of the acts of which Altamirano Palacios together with Alvaro Ruiz Tapia, First Secretary of the Nicaraguan Embassy in Costa Rica, and Cairo Arévalo Baltodano, Assistant in the Nicaraguan Consular Office, are accused, the Government of Costa Rica decided to declare them persona non grata and request that they leave Costa Rica as soon as possible. They departed in the afternoon of that same day, the 27th (doc. 3). The charges against Alvaro Ruiz and Cairo Arévalo appear in the statement by the accused Germán Pinzón Zora made on July 17 (doc. 4).

6. In the afternoon of July 27 His Excellency Miguel d'Escoto Brockman, Minister of Foreign Affairs of Nicaragua, sent the Minister of Foreign Relations of Costa Rica a telegram in which he lodged "the most energetic protest of the Government of Nicaragua" regarding the detention of Germán Altamirano which he described as a "great outrage" and "unjustified provocation that is inconsistent with repeated statements by the Government of Costa Rica that it is seeking to preserve and strengthen the brotherly relations between the two countries" (doc. 5). The Costa Rican Foreign Minister replied immediately. He did not accept either the Nicaraguan protest or its tone

> "not only because it is unfounded but also because it questions, for no reason whatsoever, Costa Rica's objective of preserving diplomatic relations between our two countries while the Costa Rican Government has at all times shown that it wishes to strengthen such relations within the framework of the most meticulous observance of international standards and the cultural heritage that unites Costa Rica and Nicaragua".

Minister Volio Jiménez added that he had expected Foreign Minister d'Escoto to make an apology for what the three above-mentioned Nicaraguan diplomats had done and what they had intended to do to the detriment of Costa Rican peace and security. In addition, Foreign Minister Volio pointed out that the Nicaraguan Government also owed Costa Rica an explanation

> "for the frequent incursions by the Sandinista army into Costa Rican territory and for the constant violations by the Government of Nicaragua of Costa Rica's right to free navigation in perpetuity on the San Juan River under the Cañas-Jerez Treaty of 1858 ratified by the Cleveland decision in 1888. As I reminded Your Excellency this morning, none of the notes of protest that are based on fact and on the existing legal system have been answered by the Nicaraguan Government."

In his reply Foreign Minister Volio recounted the Ministry's role in the release of Altamirano (doc. 6).

7. On the same day, July 27, the Nicaraguan Ministry of Foreign Affairs, with no justification whatsoever and simply as a reprisal, requested the withdrawal of Euclides Sandoval, and Luis de Anda, the Minister Counselor and Consul General of Costa Rica respectively, who left Managua today (doc. 7).

The Nicaraguan Foreign Ministry last night told the press that Altamirano was tortured and that his arrest and interrogation were conducted under the direction of a United States citizen. Those assertions have been categorically denied by the Ministry of Public Security of Costa Rica (doc. 8).

8. The serious acts for which the three aforementioned diplomats were expelled from the country are yet another manifestation of the attitude of the Nicaraguan Government, which is contrary not only to the principles and rules of present international law, but also to those that govern two neighboring countries with long-standing cultural ties.

It has been observed, in fact, that from the beginning of the Government of President Monge, the Nicaraguan Army was making incursions into Costa Rican territory, at times on the pretext of undertaking punitive actions against Nicaraguan citizens crossing the border into Costa Rica, and at other times with no reason or pretext at all other than to intimidate and cause general alarm among Costa Ricans along the border. On each such occasion, members of the Nicaraguan Army entered our territory heavily armed and with complete disrespect for our authorities, who were few in number and poorly equipped. These incursions prompted complaints by the Costa Rican Foreign Ministry to officials at the Nicaraguan Embassy in Costa Rica as well as to Foreign Minister d'Escoto and Deputy Foreign Minister, Hugo Tinoco, Acting Minister of Foreign Affairs. The incursions also resulted in a number of protest notes (doc. 9). With the intention of finding a satisfactory mechanism for discussing these incursions and preventing their recurrence, the Government of Costa Rica proposed the establishment of a Mixed Commission, which Nicaragua accepted (doc. 10). The meeting to coordinate the formation of this intergovernmental group was held at the Costa Rican Foreign Ministry on June 15, and was attended by, among other officials, Foreign Minister Volio and Deputy Minister Tinoco, Acting Minister of Foreign Affairs of Nicaragua. The first meeting of the Mixed Commission was held at Managua on June 11 and 12, with positive results (doc. 11). The second round of meetings was held here in San José on July 28, 29 and 30. The Commission is mandated to discuss border issues, including a detailed delimination of the border, but it is not empowered to discuss Nicaraguan interference with free and perpetual navigation on the San Juan River, a matter which the Government of Costa Rica feels cannot be disputed.

At the conclusion of the sessions of the Commission, progress was made with respect to implementing its mandate (doc. 12).

9. In addition to the above, mention must be made of the very serious act, which is another manifestation of the Nicaraguan Government's hostility, of violating the right of free and perpetual navigation on the San Juan River, bordering on Nicaragua. This right is indisputably confirmed by the Cañas-Jerez Treaty of 1858, which established

> ". . . that the Republic of Costa Rica will enjoy in these waters perpetual rights of free navigation, from the aforementioned mouth to a point three English miles before reaching the Castillo viejo [old castle] . . ." (Article 6).

Article 9 of the treaty reinforces this right, stipulating that

> ". . . for no reason whatsoever, even should a state of war unfortunately

> exist between the Republics of Nicaragua and Costa Rica, shall they be permitted to engage in any act of hostility between themselves at the Port of San Juan del Norte, or in the San Juan River and Lake Nicaragua".

Despite Costa Rica's clear right to free and perpetual navigation on the San Juan River, the present Government of Nicaragua has established unlawful conditions for the navigation of Costa Rican vessels on the waters of that river, e.g., the right to discriminate against persons by reason of their nationality, allowing only nationals of certain countries to navigate the waters; requiring visas and passports of anyone aboard a tourist vessel travelling from Puerto Viejo on the Río Sarapiquí in Costa Rican territory, to Barra del Colorado on the Atlantic, also in Costa Rican territory, and vice versa; the registration of tourists on such trips, together with their luggage and other belongings; the collection of tolls; prohibiting small commercial and cattle vessels from navigating the San Juan and requisitioning the vessels; detaining persons customarily using the San Juan River for commercial and agricultural activities; intimidating tourist vessel passengers; and most serious of all, the closing of navigation on the San Juan for a number of days.

The Foreign Ministry has sent the Government of Nicaragua six protest notes regarding this interference, with no reply to date except in one case in which the Nicaraguan Government did not refer to the subject of the protest. The Costa Rican Foreign Ministry will nonetheless make other appropriate bilateral efforts to bring this interference to a halt, inasmuch as free navigation on the San Juan River is not subject to any conditions whatsoever, particularly those imposed unilaterally by Nicaragua. It is the responsibility of Costa Rica, under its sovereign rights, to take the necessary steps to ensure that free navigation on the San Juan River by Costa Rican vessels is carried out in accordance with Costa Rican law.

It should be noted that the decision handed down by President Grover Cleveland not only determined that the 1858 treaty was valid, but also confirmed Costa Rica's right to free and perpetual navigation on the San Juan River under the Cañas-Jerez Treaty with the exception, according to President Cleveland, of warships. Cleveland's arbitration or decision dates from June 22, 1888, and the reference to the prohibition of warships on the waters of the San Juan River is justified in one of the eleven points of "doubtful interpretation" submitted to his arbitration under the Arbitration Convention of June 22, 1887, between Costa Rica and Nicaragua. In other words, President Cleveland's decision established only one restriction on Costa Rican use of the waters of the San Juan River, that of navigating with warships. Consequently, the restrictions imposed unilaterally and unlawfully by the Government of Nicaragua and any other restrictions as may be similarly imposed in the future, are and will be contrary to the treaty and are obviously hostile acts that very seriously affect the relations between Costa Rica and Nicaragua (docs. 13 and 14).

The following are some examples of the interference that has occurred during the presidency of Luis Alberto Monge:

June 6, 1982: A tourist boat of Swiss Travel Service S.A. transporting ten tourists to Puerto Viejo was intercepted by a Sandinista patrol, which forced them to disembark, show their visas and register their personal effects.

June 9, 1982: A guide from the same travel agency on his way from Puerto Viejo to Barra del Colorado with equipment he had to transport was intercepted by a Sandinista patrol whose members refused to identify themselves and warned him that they would not allow the tourist boat to proceed on June 13 unless those aboard had Nicaraguan visas.

June 13, 1982: The tourist boat was intercepted again, and although the Nicaraguan authorities did not demand visas as they had done on June 6, they registered all passengers and their luggage.

June 20, 1982: The river was not patrolled, but again the authorities requested the passengers aboard the tourist boat to identify themselves and register their belongings.

June 27, 1982: Same as June 20.

July 16, 1982: The Nicaraguan authorities advised the captains of Swiss Travel S.A. vessels that because they were celebrating the anniversary of the Sandinista revolution, passage would be prohibited to all Costa Rican vessels from 6 p.m. on July 16 until July 22.

July 17, 1982: A boat equipped with an outboard motor was stopped by the Nicaraguan authorities and its three crew members, all Costa Ricans, were prevented from navigating the San Juan River. One of the men, Elí Alvarado Sancho, was detained for 48 hours. He was released through the intercession of Foreign Minister Volio with the Embassy of Nicaragua (doc. 15).

July 18, 1982: Two boats belonging to Swiss Travel S.A. proceeding from Barra del Colorado to Puerto Viejo, Sarapiquí, to pick up a group of tourists were stopped by Nicaraguan authorities and forced to return without the passengers (docs. 16 and 17).

July 23, 1982: The Nicaraguan authorities continued to detain tourist vessels and to inspect luggage and other items belonging to the passengers, but this time they did not collect a fee for clearance, as they had unlawfully done before.

July 25, 1982: They resumed collecting a clearance fee, in addition to registering luggage. This action was repeated by the same authorities on July 28.

Documents 18, 19, 20, 21, 22, and 23 are presented as evidence of some of the interference described above.

Statements from the captains of the tourist boats on the San Juan River are being received at this time. Statements by two rural policemen who were aboard one of the tourist boats on July 18, 1982, have been included.

It is necessary to point out that, as shown by the enclosed document, the activities of schools in the northern zone have also been affected. Not only has enrollment dropped but one of the schools, Poco Sol School, had to be closed because of the parents' fear of Nicaraguan Army raids.

Overflights by aircraft from the Nicaraguan Air Force constitute another violation of Costa Rican territory.

The Costa Rican Government has made clear public statements regarding its neutral position in so far as Nicaragua's internal affairs are concerned. Costa Rica respects a people's right to self-determination and the principle of nonintervention in the internal affairs of other countries. As evidence of that policy, I have enclosed the May 22, 1982, decree of the Governing Council (doc. 24).

Nevertheless, the Costa Rican Government cannot, and should not, remain passive in the face of so many unfriendly, and even hostile, acts that adversely affect its sovereignty and its rights, including the right to live in peace, which is so dear to the Costa Rican people. For that reason the Costa Rican Government will exhaust the diplomatic resources available to it and will do everything possible to show the Government of Nicaragua that it only wishes to maintain normal and even cordial relations with it. However, if no solution to the problems referred to in this document can be reached through diplomatic channels, the Government, with the overwhelming support of the Costa Rican people, will take whatever steps it considers adequate to assert its rights.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

San José, July 28, 1982.

(Signed) Fernando VOLIO JIMÉNEZ,
Minister of Foreign Relations
and Worship.

[Ministry stamp]

Annex 58

"HONDURAN ARMY DEFEATS CUBAN-TRAINED REBEL UNIT", *WASHINGTON POST*, 22 NOVEMBER 1983

[Not reproduced]

Annex 59

Speech by Roberto Martínez Ordóñez, Honduran Ambassador to the Organization of American States, 14 July 1983, *Foreign Broadcast Information Service*, 20 July 1983

[Speech by Roberto Martinez Ordonez, Honduran ambassador to the OAS, during a special session of the Permanent Council held at OAS headquarters in Washington — live.]

[Text] Mr. President and representatives:

We know very well that all the members of this Permanent Council are aware of the critical situation of Central America. We also know that the Governments that make up this Organization, as well as their distinguished representatives, know the efforts that the Contadora Group countries — Colombia, Mexico, Panama and Venezuela — are making to find a just and proper solution for this delicate situation.

The Honduran constitutional Government, headed by Roberto Suazo Cordova, thoroughly aware of its duties as a member of this Organization, has given and continues to give its fullest support and cooperation to the efforts of the brother countries that make up the Contadora Group, with the clear objective of reaching, through a civilized dialogue and as soon as possible, serious regional agreements to reach a comprehensive settlement to the problems of the region.

The key issues that characterize the Central American crisis were clearly identified at the outset of preliminary contacts between the foreign ministers of Colombia, Mexico, Panama and Venezuela and the five Central American countries, which culminated in their first meeting held in Panama City from 19 to 21 April.

In the communiqué issued by the Contadora Group after this meeting, the problem areas were identified as follows: the arms buildup, the control of weapons and their reduction, arms trafficking, the presence of military advisers and other forms of foreign military assistance, actions aimed at destabilizing the internal order of States, threats and verbal aggression, military incidents and border tension.

There is a remarkable coincidence between this list of matters and the list that my Government presented, through its foreign secretary, at this Organization on 23 March 1982, when it proposed a peace plan for Central America. This coincidence confirms the sincerity with which Honduras has approached the problem from the beginning.

It must also be noted that the simple act of listing the problem areas show that their nature is predominantly multilateral, although this does not exclude problems that can be solved through bilateral negotiations and others that are only the concern of each country.

It is important to bring to the attention of the distinguished representatives the fact that the totalitarian Nicaraguan régime is the main factor in the emergence of the regional crisis, because it has unleashed actions aimed at destabilizing governments in other Central American countries. These actions include, among others, direct support for terrorist and subversive groups. To do this, Nicaragua has the backing of antidemocratic groups and countries that are alien to the Central American region.

This behavior has prompted a natural rejection in my country, and in other nations in the region. These nations have been forced to take internal security measures to defend their legitimate rights and the democratic system that they freely chose.

My Government recognizes and supports the efforts being made within the Contadora Group to achieve the goals it set out to reach. But despite these efforts, the incidents that have been occurring since the beginning of its fraternal endeavor show the aggravation of the Central American situation as the direct and immediate result of the warmongering and threatening attitude of the Sandinist régime.

Nicaragua has continued in its spiralling arms buildup. It has continued the trafficking of weapons from several places through its territory, particularly to El Salvador, violating our sovereignty.

The actions for the political destabilization of the area have not been interrupted; on the contrary, they have been increased. The acts of provocation and aggression against Honduras have not ceased; rather they have flared up. In addition, the recent massive mobilization of Nicaraguan troops at our southern border justifies our alarm and apprehension that they are stepping up their plans for a larger military aggression against our country, which would end, once and for all, the hopes for peace and security in the Central American region.

All this clearly shows that Central America is experiencing a widespread conflict provoked by Nicaragua, which has consequences for all countries in the region. Therefore, this is not just a bilateral conflict, as the Sandinist régime has tried to label it.

If it is important for Nicaragua to approach its internal problem — a problem that sometimes prompts conflictive situations of a bilateral nature with other States — at a discussion table, it is of the highest priority for the rest of the Central American countries to discuss the regional problems created by Nicaragua because of its worrisome arms buildup, its direct participation in the destabilization of the other Central American Governments, and its clandestine arms trafficking.

The reason that the Honduran Government had to call this special meeting of the Permanent Council was to explain clearly to the Latin American Governments the situation in Central America and our peace-loving attitude. In addition to drawing your attention to the gravity of the situation, we are expressing our hope that your effort in achieving peace and security will, because of the moral force it represents, prevent an armed aggression that we foresee will come from Nicaragua.

We hope that the OAS and the governments that comprise it will take due notice of the serious Central American situation and the factors that determine it, so they can calmly analyse the possible measures that could be taken, but within the parameters of the duties and responsibilities prescribed in the OAS Charter.

As a matter of fact, in its preamble, the OAS Charter states that all our States have signed it with the certainty that a genuine sense of Latin American solidarity and good-neighborly policy can only mean the consolidation, within the framework of democratic institutions, of a system of individual freedom and social justice on this continent based on respect for human rights.

When the main objectives of the OAS were determined, Article 2 was formulated to establish, among other things, the strengthening of peace and security on the continent, the prevention of possible causes of difficulties, the guarantee of peaceful solutions of conflicts between member States, the organization of solidaristic action by these States in the event of an aggression, and the promotion of solutions for political, legal and economic problems that may arise between them.

In Article 3, the Charter pointed to the following principles: International law is the norm of conduct of the States in their reciprocal relations; international order is essentially characterized by respect for the individuality, sovereignty and independence of the States; and the obligations established in treaties and in other sources of international law must be faithfully met. Good faith must guide relations among the States. The solidarity of the Latin American States and the lofty goals pursued by them demand that their political organizations be based on an effective [words indistinct] of representative democracy. The Latin American States condemn a war of aggression; victory gives no rights. An aggression against one Latin American State is an aggression against all the other Latin American States, and any international controversy that may arise between two or among more Latin American States must be solved through peaceful means.

By reading these articles, I am leaving no doubt about the OAS obligation to contribute, through its direct effort and that of its member States, to a peaceful settlement of conflicts, and to defend the right of our people to organize democratically. These articles also call for solidarity with member States that are bent on defending their institutions in the face of covert or direct aggression by sectors or countries that want to destroy the freedom of men.

In our analysis of the incidents occurring in Central America, with which most countries are familiar, we warn that our continent is facing a war without borders that is encouraged, promoted, supported and, at times, even led by foreign Marxist forces that are trying to impose, through the armed struggle, their totalitarian political-social system on us.

The names of the groups that comprise this international terrorism are not important. What is relevant is that the characteristics of their terrorist actions for social and economic destabilization are the same. The sources that supply them with weapons and destructive equipment and give them training and logistical support are also the same. The interconnection and public support existing among all these subversive movements and their mutual cooperation show that they are truly part of an overall effort for destabilization and terror within this war without borders that threatens our existence as nations.

Although these efforts for destabilization have not found a favorable echo among the Honduran people, we understand that the threat of the destruction of our way of life and government hangs over us like Damocles' sword. This is shown in the following incidents and actions:

Regarding increases in the Nicaraguan Armed Forces, the Sandinist Government currently has at least 129,200 armed men. However, London's International Institute for Strategic Studies gave a higher figure for all branches of the Sandinist Armed Forces for the 1982-1983 period. This figure does not include Interior Ministry troops. This Institute established that the total number of Sandinist troops is 136,700.

We must admit that the Sandinist Government has cunningly surprised the international public. It made certain media believe that Nicaragua is the one that could be victim of a large-scale military aggression by Honduras. I am sure, Mr. President, that if we compare the data I have supplied about the Sandinist Government's military strength, confirmed by London's International Institute for Strategic Studies, with the number of troops that make up the Honduran

Armed Forces — which is no more than 16 per cent of the Sandinist figure — we will see that the ill-intended charges that the Nicaraguan régime has been making against Honduras are increasingly unbelievable.

Nicaragua has upset the Central American region's military balance. In only four years, its armed forces have grown by 1,300 per cent. These forces numbered 10,000 men in 1979. How can they justify such disproportionate growth? Such a large armed force could serve to subject Nicaraguans to the orders of the new government, to try and impose its political and economic model on neighboring countries, or to begin interventionist military adventures elsewhere in the world.

The size of the Sandinist Armed Forces is much greater than the total of the military troops in the rest of the Central American countries. This fact alone justifies the concern, the insecurity and the threat that Nicaragua's neighboring States feel.

The rapid growth of the Sandinist Armed Forces has been accompanied by an arms buildup of unbelievable proportions for Central America. They have weapons that are not only intended for Nicaraguan use, but are sent to Costa Rica, El Salvador, Guatemala and Honduras for subversive purposes.

In the past few years, the Nicaraguan Army has been equipped with very important antiaircraft weapons, antitank arms, and field artillery, including 152-mm howitzers and multiple rocket launchers with 40 barrels and a range of 20.5 km, tanks and armored vehicles, aircraft such as MI-8 helicopters and Soviet cargo planes, amphibious tanks, patrol boats, field packs and hundreds of military trucks for troop transport.

One hundred and twenty Nicaraguans were sent to Bulgaria to undergo pilot training for MIG planes, and 40 more are being trained at the Punta Clara Academy in Cuba. Why is Nicaragua preparing itself in this way?

Your Excellencies must not ignore that this quantity of troops and this diversity of offensive weapons gives reason for alarm throughout the region and prompts us to prepare ourselves for our legitimate defence, because that is the responsibility of any State.

You will be able to observe these proportions graphically in the material that has been distributed to you.

At the same time, we must note that while the Contadora efforts are underway, the Central American picture has continued to change. In the past few months, the shipment of arms and ammunition to Nicaragua has increased. [Words indistinct] The Brazilian Government seized three planes [words indistinct] and a C-130 that were carrying 2,000 tons of weapons [words indistinct]. The Nicaraguan leaders publicly admitted that these shipments were destined for them. Colonel Mu'ammar al-Qadhdhafi also made public remarks admitting that although the shipment had been stopped, he would continue to supply all the weapons the Sandinist régime wanted.

A few days after the seizure of the Libyan planes, Costa Rican officials discovered a 500-ton Panamanian-flag ship that was carrying weapons and explosives for Nicaragua.

On 3 June, a Bulgarian ship unloaded Soviet tanks at El Bluff port. On 5 June, a ship that had sailed from the GDR unloaded 100 military trucks and several tons of weapons and war materiel at Corinto port. On 8 June, authorities of Puerto Limon, Costa Rica, searched the hold of the Soviet ship *Nadezhda Krupskaya* and found that it was carrying several helicopters intended for the Nicaraguan Government.

On 15 June, it was learned that the Nicaraguan Navy had transported two gunboats built at the (Desterel) shipyard near Cannes, France. On the same day, it was said that the Marxist government of South Yemen was negotiating the sale of a certain number of MIG-17 fighters with Nicaragua. This information was confirmed by Miguel Bolanos Hunter, a deserter of the Sandinist counter-intelligence forces, who said here in Washington that Nicaragua was in the process of acquiring a Soviet antiaircraft defence system and 60 MIG planes.

The Honduran Government also knows that early in June the Nicaraguan Government also received at El Bluff port 20 BTR-152 armored personnel carriers, 5 BRDM vehicles, 4 BM-21 multiple rocket launchers, and other vehicles of lower tonnage whose exact quantity has not been confirmed. The destination of 5,000 boxes of ammunition found inside the *Cloud* is still unknown. This ship, which was found in the middle of the Atlantic Ocean without a flag or crew but loaded with 122-mm shells exclusively used by Soviet cannons, was towed to the Venezuelan coast.

How can it then be said that the Sandinist Government is acting in good faith in the negotiations begun within the framework of the Contadora Group, when in the past month alone Nicaragua has received no less than seven large shipments of weapons.

Is Nicaragua preparing to make peace or to wage war? Can it be believed that Nicaragua is willing to reach any kind of agreement on disarmament when it is arming itself excessively? Is it willing to reach agreements on the reduction of troops when the size of the Sandinist Armed Forces is constantly growing? In fact, its most prominent leaders have publicly stated that they hope to have weapons for 200,000 Nicaraguans.

A few days ago, on 6 July, Commander Humberto Ortega Saavedra told 300 militia chiefs that Nicaragua will continue modernizing its army, and that it will create the territorial militias in order to distribute units with better manœuvrability and weapons throughout the territory.

According to an AFP report, Ortega Saavedra stressed that thousands of civilians have joined the infantry reserve battalions, the permanent army units, and the self-defence groups in cities and towns, particularly those on the border with Honduras and Costa Rica.

It is useless to claim that such disproportionate quantities of weapons are intended for use in a direct confrontation with any of the large world powers. Nicaragua's preparation for war has been constant.

From 1979 to 1983, it has built approximately 30 new military installations with Cuban-Soviet advice. These installations will serve to lodge military personnel and keep armored equipment for transport and logistical supply. Their locations show that the Nicaraguan Government is preparing to launch an offensive operation in the north against our territory.

Nicaragua currently has three airbases capable of receiving MIG-19 and MIG-21 planes. The Montelimar, Puerto Cabezas and Bluefields installations, as well as Managua's Sandino Airport, have been reconditioned. All their landing strips have been extended to more than 2,000 meters.

At present, the San Ramon air installations are being built with Cuban assistance. These installations will have two runways for the landing and take-off of jets.

The Nicaraguan Government has also built several strategic roads, including that of Managua-Puerto Cabezas, which serve three purposes: to exercise military control over the Nicaraguan Miskito residents, to have a ground supply route from Cuba for supplies entering from the Atlantic Coast, and to develop the area, the reason that has been publicly stated.

Since late June, the Sandinistas have been increasing their activities and have been deploying troops along the border area near the Honduran departments of Choluteca and El Paraiso.

The Nicaraguan Government has deployed many troops and much military equipment to places near our country, such as Leon, Ocotal, Chinandega, Somoto, Somotillo, Jalapa, Esteli, Condega and others. This area covers a line that is approximately 250 km long, forming the so-called northern front, which obviously represents a serious threat to our country. The units that have been deployed include 5 Sandinist People's Army [EPS] battalions, 19 reserve battalions that have been trained and incorporated in the group, 1 tank battalion of the Pablo Ubeda troops, and 3 companies of special units, for a total of 29 mobilized battalions.

On 5 July, it was also reported that the EPS had implemented a new and massive mobilization of troops and Soviet tanks on the Honduran border. This mobilization was confirmed by the Nicaraguan Interior Ministry.

Mr. President and Messrs representatives, another serious problem mentioned by the Contadora Group is the secret arms trafficking.

The Nicaraguan Government has been sending weapons to the rest of Central America, especially to El Salvador, since 1980. In the specific case of Honduras, Nicaragua has repeatedly violated our territory in order to do this.

On 17 January 1981 Honduran Army troops and public security agents seized a large shipment of weapons and military supplies 16 km from Comayagua. The shipment had been well camouflaged inside a van that entered our territory through the Guasaule customs post. These weapons were for Salvadoran guerrillas. We seized M-16, G-3 and Fal rifles; M-1 carbines; 50-cal. ammunition clips; Chinese RPG rockets; 81-mm mortar rounds; ammunition clips (caterinas); communications equipment; and medicines. Five Hondurans and 12 Salvadorans were arrested for their involvement in this shipment of weapons and supplies.

The arms traffic has continued through different ways and means. On 7 April 1981 troops of the 11th Infantry Battalion stationed in Choluteca seized another van carrying 7.62-mm and 5.56-mm ammunition that had been packed in polyethylene bags and hidden in the sides of the van. The troops also seized a large quantity of materiel for the Armed People's Revolutionary Organization, ORPA, of Guatemala, which was supposed to get the entire shipment. This van had left from Nicaragua and was detained at the Guasaule customs post.

Honduran territory has also been illegally used for the passage of troops from Nicaragua to El Salvador. On 26 March 1983 a Honduran patrol caught a group of guerrillas by surprise in Las Cuevitas, Nacaome Municipality, Valle Department, in southern Honduras. They were en route to El Salvador from Nicaragua. Two of the guerrillas were killed in a clash with the Honduran patrol. On this occasion we seized M-16 rifles, one Czechoslovak 7.65-mm machinegun made by FHX, M-16 clips, machinegun clips (caterinas), a portable radio, an FSLN flag, FMLN and FSLN manuals, as well as two notebooks containing full information on the general route used to move military personnel and weapons through Honduras on the way to El Salvador.

The Sandinist régime's intervention in all the countries of the Central American region is also revealed in the training of Hondurans at several of the 11 schools that are operating in Nicaragua for this purpose. They are located in the different military regions of that country.

Nicaragua is also the bridge for the training of Hondurans in Cuba. On 24 January 1983 a group of 16 Hondurans was captured by our authorities in Tegucigalpa. According to statements given by the arrested persons, their purpose was to travel to Cuba via Nicaragua in order to receive guerrilla training and then return to the country to disrupt order. The arrested persons charged that Professor Ramon Amilcar Cerna Gonzalez was responsible for this operation. They also said he was the Honduran contact with high Sandinist officials.

Nicaragua has also introduced another perturbing element into Central American relations, because it has brought into its territory more than 17,000 military and other kinds of advisers, mainly from Cuba, the Soviet Union, the GDR, Bulgaria, North Korea, Vietnam, the PLO and Libya, among others. Such an impressive foreign presence makes Nicaraguan territory an area of intervention by foreign forces. It has also brought to our region the tensions deriving from an extra-continental threat, thus allowing the East-West conflict to become evident here in more ways than one.

Since the Sandinist Government took over power and the internal violent conflict that disrupts El Salvador became worse, Honduras has suffered a series of heightened actions against its democratic institutions. These actions are clearly linked to the Nicaraguan Government and the FMLN. We can mention, as an example of these actions, the kidnapping of Italian businessman Higinio Tarantelli D'Andrea on January 1980. He was later murdered. Likewise, there was the April 1980 kidnapping of Texaco general manager Arnold Quiros, in San Pedro Sula, barely three days before the elections for deputies to the National Constituent Assembly. Also, there was the takeover of the OAS headquarters in Tegucigalpa. On that occasion, OAS representative Ulises Pichardo and three employees were held hostage. In addition, there was the kidnapping of banker Paul Vinelli by a commando of the People's Liberation Forces, FPL, which is part of the FMLN, in December 1980. Vinelli was released on 2 May 1981 after a large ransom in dollars was paid. In March 1981 an airplane of the Honduran company SAHSA [Servicio Aereo de Honduras, S.A.] was hijacked by a commando of the Cinchoneros group comprised of three men and a woman and was forced to land in Nicaragua. It was later flown to Panama, from where they demanded that the Honduran Government release Salvadoran FMLN guerrilla leader Facundo Guardado and other guerrilla members who had been arrested in Honduras and charged with the clandestine trafficking of weapons through our territory.

On August 5, 1981 the FMLN kidnapped engineer German Eyl, who was released on 11 December 1981 after a large ransom was paid, again in dollars. On 10 March 1982 businessman Jacques Casanova was kidnapped by a group belonging to the FPL, which is a part of the FMLN. Casanova was freed from a terrorist cell on 19 May 1982 by a police commando operation. On 28 April 1982 a DASH-7 airplane belonging to the Honduran airline SAHSA was hijacked in the port of La Ceiba, Atlantida Department, in Honduras. The Lempira group claimed responsibility for this action, it acted in coordination with the FMLN. The hijackers finally released the passengers and the airplane's crew, and left for Cuba on 1 May 1982. At 1830 on 17 September 1982, in San Pedro Sula, 12 terrorists violently entered the Cortes Chamber of Commerce and Industries, firing their machineguns and wounding two Honduran citizens. This action initiated the criminal kidnapping of over 100 people, including two ministers of state and the president of the Central Bank of Honduras, who were participating in a seminar on economic policies. The Cinchoneros group claimed responsibility for this action; its links with Nicaragua, Cuba and the Salvadoran guerrillas were clearly established. This group demanded that the Government release Salvadoran guerrillas.

Eight days later, after many delicate conversations conducted through the valuable mediation of the Apostolic Nuncio in Honduras, the Bishop of San Pedro Sula and with the friendly cooperation of Panama, the terrorists released the hostages and left Honduras for Panama in a Panamanian Air Force airplane. Twenty-four hours later, they continued their trip to Cuba. On 14 December 1982 a group from the People's Revolutionary Movement, MRP, kidnapped

Doctor Xiomara Suazo Estrada in Guatemala City. She is the daughter of Honduran President Roberto Suazo Cordova.

Mr. President, this list of actions is not complete. Other terrorist actions include the destruction of two power stations that left 80 per cent of the Honduran capital without electricity, and the detonation of explosive devices in offices belonging to the Salvadoran airline TACA and Air Florida, the Panamerican Life Insurance Company and IBM, all US companies.

Beyond our borders, explosive charges were placed in SAHSA's offices in San José, Costa Rica, and in Guatemala City, Guatemala. The Costa Rican Government expelled two Nicaraguan diplomats because they were responsible for those actions.

On 14 April 1983 the Honduran diplomatic mission in Bogatá, Colombia, was blown up while Nicaraguan Foreign Minister Miguel d'Escoto Brockman was there on an official visit. This terrorist act was perpetrated with great cruelty, for the Honduran consul was tied up and the bomb was placed in front of him and detonated. The Honduran official suffered grave wounds and contusions. Other terrorist acts include the placement of bombs in the Chilean and Argentine embassies in Tegucigalpa, at the Honduran brewery in San Pedro Sula, and at the Texaco refinery in Puerto Cortex, and the direction of machinegun fire at a group of members of the US military mission in Honduras.

At the same time, the Honduran diplomatic missions in Ecuador, Mexico, Venezuela, France, Great Britain and Germany were subjected to assaults and large demonstrations. The persecution of our country is also evident on our border, where Nicaragua harasses Honduran border towns. From 1979 to date, the Sandinist régime has staged nearly 200 attacks on and violations of our territory, airspace and water. In these incidents, unarmed civilians and Honduran troops have either been killed or wounded. When the Sandinist forces enter our territory, they pillage and destroy and kidnap defenceless Honduran citizens. They attack our fishing boats, within our territorial waters in the Atlantic and Pacific Oceans, with artillery fire. The boats are captured, along with their crews, and taken to Nicaraguan ports.

The Nicaraguan leaders level all kinds of verbal threats and insults against Honduras and its highest officials in an attempt to create a climate of increased bilateral tension. Last year, Commander Tomas Borge said in Madrid that Nicaragua would give all necessary support to guerrilla actions in Honduras. In March 1983 Commander Humberto Ortega Saavedra threatened Honduras with war, saying that Nicaragua's troops, airplanes, tanks, artillery and all of its offensive armament were ready to perpetrate an act of aggression against our country. These statements provoked a protest from Honduras, conveyed by its Foreign Secretariat.

In April 1966 this same commander told *The New York Times* that Honduran revolutionaries could strike the Honduran Armed Forces if they continued to launch attacks on Nicaraguan territory. This statement was also rejected by my Government. During the same month, the Nicaraguan foreign minister made a statement in Panama, declaring that the chances of open war between his country and Honduras had increased. In a speech before the UN Security Council in May 1983 the foreign minister said that Nicaragua could start a war with Honduras.

Last month, Sergio Ramirez Mercado, member of the Nicaraguan Junta of the Government of National Reconstruction, said in Caracas, Venezuela, that everything seemed to indicate there would be an armed confrontation between Honduras and Nicaragua. Commander Tomas Borge also said last June, in a speech before Nicaraguan workers, that terrible and glorious times are near. He asked the workers to make sacrifices and to prepare for war against Honduras. More recently, on 2 July, the Nicaraguan interior minister himself told the UPI news agency that he saw no chance that an agreement would be reached to avoid war with Honduras.

All of these statements and threats have been accompanied by false accusations that Honduran soldiers are harassing the Nicaraguan troops. They have even reached the extreme point where the Nicaraguan foreign minister said on 3 May 1983 that Honduran soldiers had crossed the border and invaded Nicaragua. This information was so absurd and incredible that the Nicaraguan foreign minister himself corrected the statement, saying this was an erroneous interpretation of the communiqué issued by the foreign ministry.

Mr. President, Messrs representatives, this is the current situation in my country, a country that is being threatened, harassed and attacked by the Sandinist Government. This is the situation in the Central American region, also being threatened, harassed and attacked by the Sandinist Government, which has shown not the slightest hesitation in unleashing an unrestrained and vigorous arms buildup, thus breaking the terms of security in the Central American isthmus; which is indifferent toward the disastrous consequences that the creation of an enormous army, which exceeds the number of military troops of the rest of the Central American countries combined, will have for the region, which continues to be the main weapons supplier for the subversive and terrorist movements in the Central American region, which cares nothing about the consequences of permitting the use of its territory by extra-regional and extra-continental forces, threatening the peace and security of the entire American continent; and which continues to harass our southern border and to kill Honduran peasants and foreigners, such as the case of two US journalists who were killed recently by the explosion of a mine placed by the Sandinist People's Army, in violation of our territory. These incidents have also provoked a mass exodus of Honduran border inhabitants to our interior.

Honduras has not broken its word or the gentlemen's agreements that it has entered. The distinguished representatives are aware of the goodwill with which Honduras accepted the suspension of discussions of its proposal to this council, so that the Contadora Group's noble efforts would have an opportunity to be fruitful. You are also aware of the commitment by which Nicaragua undertook to abstain from bringing actions up within the United Nations, a commitment that the Sandinist Government did not honor.

At a news conference in Mexico City on 13 April 1983, His Excellency Mexican Foreign Secretary Bernardo Sepulveda admitted that Honduras' conciliatory position within the OAS made Contadora's fraternal efforts possible. Referring to the meeting that the group's foreign ministers held in Panama and that established their efforts, the Mexican foreign secretary said, and I quote: "It was initially noted that the most immediate task was to guarantee that the OAS Permanent Council would not impede the Contadora Group foreign ministers' actions, in terms of initiatives to find solutions in Central America." This was an urgent matter, because the OAS Permanent Council was scheduled to debate a draft of a resolution proposed by Honduras on Monday afternoon. Fortunately, through a series of talks that we held with other parties interested in this issue, it was decided that the OAS Permanent Council would postpone this discussion and in this way there would be an easing of pressure, so that the regional forum could transfer the issue to the Panama forum, that is, to the Contadora foreign ministers. At the same time, it was stressed that it would be advisable that efforts be made in the United Nations so that no action would be taken there that would duplicate the work that had just begun in Panama on the previous Monday.

The parties that are interested in this issue accepted our proposal with great interest and decided to request that the OAS Permanent Council postpone discussion of the issue. This was the first action that was taken on the issue and that — I repeat, Foreign Secretary Sepulveda said this — freed us to take direct action on the subject.

This verbatim statement and the well-known circumstances of what has taken place render any further comment on the situation unnecessary. Nevertheless, they reaffirm our view that it is essential that the fulfilment of agreements that might be reached among the Central American governments to guarantee peace must be effectively verifiable.

According to the OAS Charter, this subject falls under the essential objectives and nature of our organization. It is also advisable that we note that the régime that has prevailed in Nicaragua since 1979 was born under the inspiration of and with the support of the OAS. On that occasion, the following essential foundations for its historical viability were established:

(1) The immediate replacement of the Somozist régime. (2) Installation in Nicaragua of a democratic government, whose composition would include the main representative groups that are opposed to the Somoza régime and which would reflect the free will of the Nicaraguan people. (3) The convocation of free elections as soon as possible, which will lead to the establishment of a truly democratic government that will guarantee peace, freedom and justice.

Of these foundations, as established and fully accepted at the 17th consultative meeting, particularly by those who have since led the Nicaraguan Junta of the Government of National Reconstruction, only the first has been fulfilled. The rest of the foundations, which constitute the new régime's moral and legal commitment to this organization, have been made a mockery, just as the continent's political desire has been made a mockery.

Mr. President, we ask the OAS Permanent Council to take note of our speech, which is supplemented by the illustrative material that we have distributed. We also ask it to take note of Honduras' unyielding desire to promote peace in our region and to further strengthen the democratic institutions that are the common aspiration of our peoples. We declare before you that within that spirit, Honduras will attend the next Contadora Group meeting and that, in short, it will fulfil its obligations as a peace-loving State and a member of the OAS.

Mr. President, before ending my speech I would like to invite those colleagues who wish to do so to view, once you have closed the session, a short documentary, lasting 12 minutes and 40 seconds, in this same room before going to the reception that you, Mr. President, are holding for his excellency the Guatemalan ambassador. Thank you very much, Mr. President.

Annex 60

REMARKS OF MR. FLORES BERMUDEZ, REPRESENTATIVE OF HONDURAS, BEFORE THE UNITED NATIONS SECURITY COUNCIL, 4 APRIL 1984, S/PV.2529 (EXCERPT)

PROVISIONAL VERBATIM RECORD OF THE TWO THOUSAND FIVE HUNDRED AND TWENTY-NINTH MEETING

Held at Headquarters, New York, on Wednesday, 4 April 1984, at 3.30 p.m.

President:	Mr. Kravets	(Ukrainian Soviet Socialist Republic)
Members:	China	Mr. Liang Yufan
	Egypt	Mr. Khalil
	France	Mr. de La Barre de Nanteuil
	India	Mr. Krishnan
	Malta	Mr. Gauci
	Netherlands	Mr. van der Stoel
	Nicaragua	Mr. Chamorro Mora
	Pakistan	Mr. Shah Nawaz
	Peru	Mr. Luna
	Union of Soviet Socialist Republics	Mr. Troyanovsky
	United Kingdom of Great Britain and Northern Ireland	Sir John Thomson
	United States of America	Mr. Sorzano
	Upper Volta	Mr. Bassole
	Zimbabwe	Mr. Mashingaidze

The President (interpretation from Russian): I thank the representative of Yugoslavia for the words of congratulations he addressed to me.

The next speaker is the representative of Honduras. I invite him to take a place at the Council table and to make his statement.

Mr. Flores Bermudez (Honduras) (interpretation from Spanish): I wish, Sir, to express my delegation's satisfaction at seeing you presiding over this Council, since your broad experience and distinguished career are a guarantee of the successful outcome of the matters to be discussed in this body this month.

The debate on the complaint by the delegation of Nicaragua has been enriched by the opinions of various delegations that have shown their interest in the situation in Central America. It is our desire today to make another constructive contribution and to take advantage of the invitation extended to us to take part in these deliberations so as to make clear the framework within which these problems should be dealt.

In several statements mention has been made of historic factors besetting our region. For our part, we also wish to mention some things which have not yet been considered and which may serve to make better known the problems of the region.

Although historically the Central American countries have had much in common in their political, economic and social evolution, their relationship has not been characterized by equal and equitable development. Without going into too much detail, I would point to the case of Nicaragua and the contrast with recent historical developments in Honduras.

While Nicaragua was suffering under a hateful dictatorship which tended to benefit only one family, in Honduras, steady social progress was being made through modern legislation which sought to regulate and harmonize labour-management relations. While in Nicaragua for more than 40 years ferocious repression was carried out against the people of that country, in Honduras, agrarian reform was gradually developing, together with civil service and social security legislation which reflected the Government's interest in bringing together all sectors of the nation. While Nicaragua's foreign trade tended to benefit only the Somoza family, in Honduras the exportation of such important items as coffee benefited 45,000 Honduran families.

I do not wish to tire this Council with a detailed account of contrasts, but it is indeed our intention to make clear the fact that for more than 40 years the internal contradictions in Nicaragua were at the very opposite pole from the labour gains, progress in the agrarian sector and social advancement which gradually came about in our country.

The alternative sought by the people of Nicaragua through a violent, collective endeavour which involved every sector in that country — from peasants to industrialists — was the result of a political phenomenon not encountered in Honduras. The alternative sought by the people of Honduras was the peaceful path within an electoral process which gave rise to the establishment of a representative, democratic and pluralistic Government dedicated to working within a framework of peace so as to implement our development plans which are designed, not for the benefit of one family — nor do they respond to special interests — but to favour the national community, bearing in mind that the human being is the supreme value of society and State and that human dignity is inviolable.

Despite this democratic path which is now being strengthened in Honduras, my country is the object of aggression made manifest through a number of incidents by Nicaragua against our territorial integrity and civilian population. Those elements, which have obliged Nicaragua to strengthen its defences, are mainly the disproportionate amount of arms in Nicaragua, the constant harassment along our borders, the promotion of guerrilla groups which seek to undermine our democratic institutions, and the warmongering attitude of the Sandinist commanders, whose reckless, aggressive statements we mentioned earlier.

We do not wish to get into a squabble with our neighbour, Nicaragua. What we do want is to say that to cast the Central American problem in terms of Nicaragua's interests, as reflected in the initial draft resolution submitted by that country is a conceptual error. It is not just one country which is affected; it is not only one country which is suffering from conflicts. It is not only one people which is suffering and bewailing the fate of its children; it is not just Honduras and Nicaragua. It is a Central American problem, without exception, and it must be solved regionally. This view has been brought out again and again by all Central Americans throughout the Contadora negotiation process and must be reflected in the decisions adopted by this Council.

In that regard, we were pleased to hear the statements made today, and Monday afternoon, by the representative of France, who noted with satisfaction the efforts of the four countries of the Contadora Group to ease the way to a settlement satisfactory to all countries of the region. As he declared: "The countries of Central America must be permitted once again to solve their problems for themselves." (*S/PV.2527*, p. 7.)

The representative of China also agreed that the affairs of the countries of the region must be left to their respective peoples, and gave his support to the Contadora Group in its continued efforts to achieve a peaceful and reasonable solution to the Central American question. The representative of Guyana made an appeal for a halt to the unbridled arms race, for peaceful negotiated solutions to problems in Central America and repeated that the Contadora process offered a practical and solid basis for achieving negotiated solutions for the problems among the States of Central America.

Within the same context, we heard the statement made by the representative of Mexico. Amongst other things, he quoted the President of his country, who said during his recent visit to Colombia: "Contadora is a Latin American effort to resolve a Latin American conflict. The region is able to find its own answers to its own problems."

Indeed, for 14 months we Central Americans have been engaged in negotiations to achieve peace in our region under the auspices of the Contadora Group. Those negotiations have made considerable progress and right now the working groups are meeting on aspects relating to policy, security and economic and social co-operation. This is a collective effort the aim of which is to create a zone of peace where the cohesive elements of freedom, justice and solidarity are permanent, standing values for relations among our States to prosper. All of this would set aside the possibility of confrontation, establish regional security, strengthen integral democracy and give impetus to the economic and social development of our peoples.

The situation in Central America is complex and calls for a comprehensive solution. Any action by a United Nations body should be taken within that comprehensive context and should not be identified with the selective and special interests of only one of the parties.

None the less, the Nicaraguan tactics, of which we complained in the letter from the Government of Honduras dated 20 September 1983 addressed to the President of the Security Council (S/15995), have systematically been consolidated. Those tactics, based as they are on an attitude of duplicity, include a disturbing campaign of disinformation aimed at sowing confusion and ambiguity with regard to what is really happening in Central America. They have also been condemned by my delegation in several of the statements we have made in recent months when the Security Council has met at Nicaragua's request.

These activities by Nicaragua have occurred simultaneously with the negotiations being held by the Contadora countries. We have already mentioned the working groups on policy and security and on economic and social questions that have been meeting in Panama City since the second of this month. Only last night we received from Panama the alarming news that for two consecutive days Nicaragua had blocked the activities of those working groups, thereby hampering negotiations and preventing various matters from being taken up. Nicaragua proposed the cessation of normal work in the groups in order that a decision might first be taken on a special question dealing with aspects of particular interest to Nicaragua.

This attitude on the part of Nicaragua is hindering the activities of the Contadora Group, since the attempt to give priority to some items and to take special actions runs counter to the regional approach that should prevail in those negotiations.

What Nicaragua is proposing in Panama is that so long as those groups take no decisions on military or security matters it will not allow work to proceed.

That inflexible and arbitrary position is designed to bring about a crisis in the Contadora negotiations in order to do away with that subregional group and ultimately to bring the matter before the United Nations, thereby preventing the Central American peoples themselves from solving their own problems within the Contadora framework. That framework has received the full support of the international community; it has found support in the positive thinking of most Central American statesmen and intellectuals and of the four countries members of the Contadora Group. It is a process that is fully able to take up and solve the problems of the region. Nevertheless, the essential element for the success of those negotiations is the will of the Central American countries themselves. It is sad to see that that element is lacking on the part of Nicaragua.

Indeed, yesterday in Panama, not only in the security affairs committee but in the political affairs committee as well, Nicaragua indicated that the main causes of the problems of Central America were the substantive military build-up in that region, the displacement of thousands of soldiers, the holding of joint manœuvres in the area, the covert war against Nicaragua, the terrorist operations being carried out on its territory with the use of aircraft and attack-boats, the activities of the anti-Sandinist rebels, the violation of its territorial integrity and national sovereignty, the threat of force against Nicaragua and the lack of implementation of the principle of the self-determination of peoples.

That position of Nicaragua, that such matters should be taken up before any of the work of the groups can be resumed, including the work of the Economic and Social Council, has created an insidious crisis in the Contadora process. What Nicaragua is really indicating as the cause of the problems is in fact only effects. Honduras has, in this body as well as in the Organization of American States and within the Contadora Group itself, attempted to clarify the real causes. They include interference in Central America by an extracontinental Power, the breach of the terms of security in the region because of the disproportionate arming of Nicaragua, problems of an internal order caused by its authoritarian structures, attempts by countries to destabilize neighbouring régimes, the supplying to Nicaragua of 15,000 tonnes of weapons in 1983 alone, a Sandinist army of more than 25,000 men organized into 38 regular battalions with a reserve force of 38,000 men and a popular Sandinist militia numbering approximately 50,000 men.

The North American military presence in Honduras amounts at present to approximately 1,700 men. For the moment, those are the major Central American manœuvres that affect the territorial integrity of Nicaragua.

What did indeed affect stability in the region was the sending, some three weeks ago, of 2,000 Cubans to Nicaragua. Those troops have had military training and partially replace young Cuban men and women who had been in Nicaragua.

What does indeed affect stability in our region is the presence in Caribbean waters of the Soviet helicopter-carrier *Leningrad* and the Soviet destroyer *Udaloy*, accompanied by their respective frigates, the largest Soviet presence in the Caribbean since the end of the 1960s.

What do have an effect and an impact on our negotiations are the threats from Commander Ortega Saavedra, the Nicaraguan Defence Minister, indicating the possibility that local guerrilla groups will mine the ports of Central America from Guatemala to Panama, as we noted on Friday, 29 March, before this Council. On Friday last I also mentioned that following the statements by Commander Ortega five bombs exploded in the cities of Tegucigalpa and San Pedro Sula, leaving one person dead. More recently there has been sabotage of the electric power provided to some areas of Honduras from Costa Rica through

Nicaragua, which has led to the rationing of electric power in various parts of our national territory.

Among other Nicaraguan activities that pose a threat to peace are the continuation of the illegal traffic in arms by guerrilla groups in other countries; it is also continuing to provide logistic support to insurgents in neighbouring States, while its agents visit Libya, Iran and North Korea, among other countries, for the purpose of acquiring more weapons. The mining of the Nicaraguan ports was an act the responsibility for which has been attributed to insurgent organizations operating in Nicaragua. Hence Nicaragua's claim that all States should refrain from carrying out any action that might hamper the exercise of the right to free navigation in the waters of the region does not reflect what is really happening, since the mining was due to the activities of Nicaraguan rebel groups.

With regard to Nicaragua's fulfilment of its international commitments, we are compelled to make reference to Nicaragua's electoral phenomenon and place it within the Contadora context, since that was among the 21 objectives adopted by all of the Central American countries on 9 September 1983 and subsequently ratified by each and every one of our Governments, including that of Nicaragua. The adoption of those objectives was one of the most positive achievements in the negotiations that have been held under the auspices of the Contadora Group. The principal objective with reference to electoral processes in Central America reads as follows:

> "To adopt measures conductive to the establishment and, where appropriate, improvement of democratic, representative and pluralistic systems that will guarantee effective popular participation in the decision-making process and ensure that the various currents of opinion have free access to fair and regular elections based on the full observance of citizens' rights." (*S/16041*, p. 5.)

Another objective is:

> "To promote national reconciliation efforts wherever deep divisions have taken place within society, with a view to fostering participation in democratic political processes in accordance with the law." (*Ibid.*, p. 5.)

It is in the context of those commitments that we must consider the electoral preparations in Nicaragua. Looking at current developments in the electoral process we find the following discouraging elements: First, in Nicaragua certain sectors are forbidden to participate. Second, the amnesty decreed by the Sandinist Government did not pardon political and related common crimes, which would have permitted Miskito refugees in Honduras and other Nicaraguans who are out of the country to return with suitable guarantees. Third, the Government of Nicaragua continues to enforce the law of confiscation and expropriation, used against those who oppose the régime in power, and the national emergency law under which constitutional guarantees were and still are suspended. Finally, the Nicaraguan opposition has serious questions about the political process in that country. Indeed, even internationally recognized officials from European countries whose democratic traditions are long-standing have expressed concern about the lack of conditions that would guarantee impartiality and equal opportunity for full participation by all sectors.

Evidence of this includes the absence of an electoral roll or list; the extension of the right to vote to those under 18 years of age — 16-year-olds are permitted to vote — so that young people completely without political experience can be manipulated; all members of the Sandinist People's Army and of the other security forces are permitted to vote; there is no guarantee of the right of assembly, the right of association or the right of free expression, which are essential for carrying on an election campaign. Furthermore, there is an imbalance between the opposition parties and the official party. That imbalance is enormous, taking into consideration the pure and absolute identity among the Sandinist National Liberation Front, the Government and the Sandinist People's Army. That represents a close linkage of the powers of the State with the Sandinist political organization, which involves the use of State resources and of the State's coercive power and communications media for its own political advantage in the election campaign. The Nicaraguan opposition complains that it does not have the same opportunities.

The opposition in Nicaragua has also questioned the Sandinist Government's intentions regarding the elections, since the Government has violated one of the principles set forth in the Statute of Fundamental Guarantees of 1979, which states that a constituent assembly shall be elected. Now, simultaneous elections have been called for a constituent assembly and for the presidency, for a six-year term. That is contrary to the legal logic applicable here and militates against the democratic process: there can be no advance in the State system without the constituent assembly taking a prior decision.

The Nicaraguan Council of State had been discussing the electoral law, initially with the participation of nearly all sectors in the country. But because of the points I mentioned before, those sectors have withdrawn in protest against the way in which the Government is trying to manipulate the electoral process. Among the institutions which have withdrawn are the Liberal Conservative Party, the Social Democratic Party, the Democratic Conservative Party, the Confederation of Trade Union Unification, the Social Christian Party and the non-Sandinist Worker's Central.

I wish to quote the Chairman of the Nicaraguan Bishops' Conference, Monsignor Pablo Antonio Vega, who, with reference to the consideration of the electoral law by the Nicaraguan Council of State, said that that Council is a "totalitarian sham". To illustrate that fact we need only refer to the discussions going on in the Nicaraguan Council of State. Government officials have said there that the opposition will have the right to one hour per week for carrying out its political campaign on television and radio; those media belong to the State, that is, to the Sandinist Front. Thus, the time available will be less than 10 minutes a day, and that time will have to be shared out among the opposition parties. Owing to those arbitrary, minimal conditions, the opposition has asked for more time for its campaign, especially since the Sandinist Front already has nearly five years of campaigning behind it.

In addition, the opposition published, on 24 December 1983, a manifesto denouncing the Government's fraudulent intentions regarding the election. That manifesto was signed by the Nicaraguan Worker's Central, the Confederation of Trade Union Unification, the Democratic Conservative Party, the Social Christian Party, the Social Democratic Party, the Authentic Social Christian Popular Party, the Nicaraguan Chamber of Industry, the Nicaraguan Chamber of Construction, the Nicaraguan Confederation of Professional Associations, the Confederation of Chambers of Commerce, the Nicaraguan Development Institute and the Union of Agricultural Producers. The manifesto called for: the separation of State and party; the abandonment of laws which infringe human rights; a genuine amnesty; respect for freedom of religion; an independent judiciary; the elimination of restrictions on the laws of *habeas corpus*; and a national dialogue on the question of elections.

In another communiqué dated 21 February 1984, the armed opposition made up of the two groups struggling within Nicaragua, one in the north and the other in the south, also rejected the electoral process as put forward and expressed its desire to participate in an open, honest electoral process, with equal opportunities and appropriate guarantees.

All this opposition to the electoral masquerade makes us think about this situation in Nicaragua. We wonder whether the Government of Nicaragua is adopting measures which could lead to the establishment of a representative, pluralist democratic system, guaranteeing effective participation by the people. We wonder whether by acting in the way which has been denounced by the Nicaraguan opposition the Government is promoting action towards national reconciliation, as it has undertaken to do in accordance with the points adopted in the Contadora negotiations.

The answer is no. For what they have done is to call for more weapons, for more political control and for increasing structural rigidity.

I have mentioned these internal problems of Nicaragua for the sole purpose of showing how they extend beyond the borders of that country, with a considerable negative effect on our interest in the development of our democratic institutions, in order to fulfil our development plans and meet the vital needs of our population. Honduras is the first to support multilateral negotiations within the Contadora framework in order to find a negotiated peaceful solution to the problems of the region, problems which are concentrated in Nicaragua.

In a joint statement issued at a meeting of their Ministers for Foreign Affairs a few days ago — 26 March — at Tegucigalpa, both Costa Rica and Honduras reiterated the following:

> "They agreed that the democratic, representative and pluralist system is the only system for political development guaranteeing the effective exercise of freedom and the full enjoyment of human rights. In this regard they reiterated the firm purpose of both Governments to promote and strengthen democracy in the region. They reaffirmed the decision of their Governments to seek a peaceful comprehensive regional settlement of the crisis in Central America and pointed out the appropriateness of making every necessary effort to see that the countries of the region finally take the path of political, economic and social democracy. They drew the attention of the international community to the need to find appropriate means to guarantee security for the Central American region based on the principles of non-intervention; rejection of the threat or use of force; the use of peaceful procedures for the solution of disputes among States, as well as on the urgent need to put an end to the arms race through fully verifiable agreements establishing a reasonable balance of force in Central America."

There can be no exception in the Central American crisis. It is our hope that our neighbour will carry through the commitments of Contadora, not only with regard to its internal political process, but also with regard to the other crucial points which it is necessary to carry through regionally, with regard to disarmament and other military aspects which are implicit in the problems of Central America.

The joint Technical Group, at the foreign minister level, has described Nicaragua's attitude within the Contadora Group and at the meetings which should be going on right now in Panama as a boycott: it proposes that every item should be taken up in its respective field. However, we have been told that Nicaragua is continuing to insist, even in the Committee on Social and Economic Affairs of the Contadora Group, that military and security items should be discussed first. That Committee has vital functions in the economic and social area, since it is in that field that the many causes of the Central American conflict can be found. It is counter-productive to underestimate the valuable contribution that could be made in dealing with causes and not effects.

In Panama the delegations of Honduras, Costa Rica, Guatemala and El Salvador are at this moment being prevented by Nicaragua from taking up the work on their agenda. It is a matter of concern that priority should be sought on so small a number of the 21 points of the Document of Objectives, thus preventing a comprehensive and simultaneous discussion of all the problems of the region. My delegation also wishes to express its concern that not all countries in the Contadora Group that have offered their good offices have adopted impartial approaches to ensure the success of the negotiations.

In July 1983 Nicaragua insisted in the Contadora negotiations that partial agreements should be reached to meet its own special interests, whether or not they satisfy the other countries of the region. Throughout the negotiations Nicaragua's approach has been unilateral; Nicaragua in its own self-interest, has insisted on dividing the discussion of security matters into two stages: first, immediate action tending to satisfy solely Nicaragua; and, second, the long-term aspects of security and common interests.

In July 1983, during the third meeting of Contadora, Nicaragua highlighted ongoing activities in order to appear once again the victim. On 9 September 1983, at the fourth meeting of Contadora, the eight countries unanimously responded to Nicaraguan claims about the global nature of the Central American conflict — which was why Nicaragua had to accept the Document of Objectives serving as the basis for all negotiations that would henceforth be carried out. None the less, although Nicaragua had made a commitment of support for the 21 points in the Document of Objectives, it continued to boycott the Contadora meetings, keeping it in recess from September last year to January this year, a period during which it sought to bring the matter to the Security Council, and even before the General Assembly, so as to take it out of the hands of the Contadora Group. These intentions of Nicaragua run counter to General Assembly resolution 38/10, adopted on 11 November last year, to the effect that Central American conflicts should not be made part of the East-West confrontation.

In November 1983, during the General Assembly of the Organization of American States (OAS), headquartered in Washington, in the Embassy of Panama in that city agreement was reached to convene the Technical Group of Contadora in meetings on 1 and 2 December. This proved impossible, because using the same delaying tactic Nicaragua proposed a written commitment on military and security aspects, a tactic which is faithfully reflected in the draft resolution it has introduced here, a draft resolution which is selective, since it takes into account only the interests of that country without considering the other matters related to the regional peace process and departs from the objectives endorsed by the Central American countries at the joint meeting of Ministers of Foreign Affairs held in Panama last September.

At the fifth joint meeting of Foreign Ministers, held on 7 and 8 January this year, the delegation of Nicaragua again presented its unilateral interests, seeking to use Contadora only for its own ends. None the less, at that meeting the decision was adopted to set up three committees on the basis of the document of rules for the carrying out of commitments entered into in the Document of Objectives. There is now ample information that those three committees are designed to deal, first, with political affairs; second, security matters; and, third, social and economic questions.

As we have made clear here and on other occasions, all this is part and parcel of Nicaragua's unswerving attempt to create a crisis in the peace negotiations, thereby doing away with that subregional body for the sole purpose of making the United Nations intervene in the conflict.

As the representative of a Central American country, I have asked to speak today so that our voice, which reflects the position of a State which has taken an active part in restoring regional peace, can be heard with the attention it deserves. Many statements have been made here supporting the Contadora process. If there is a real commitment in favour of the Contadora initiative, serious account must be taken of the fact that endorsement of the unilateral interests of Nicaragua in the terms of the draft resolution contained in document S/16463 would also mean support for that country and its actions within the context of the Contadora negotiations. In the terms in which they are expressed, those actions seriously threaten to destroy the Contadora initiative; they threaten to destroy a process which has received the praise of the international community and earned the pride of Latin Americans — a process which represents the maturity and responsibility of our peoples to resolve our own problems by ourselves. It also embodies the hope of Central Americans to overcome their difficult situation by peaceful means.

To take part in any support for this draft resolution would therefore involve a responsibility of historic proportions which the members of this lofty Council must weigh carefully. This is not just a political endorsement for Nicaragua. What is at stake here is the future of the negotiating process for peace, the future of Central America.

It is timely to bring to the attention of the Council the words of the Secretary-General, Mr. Javier Perez de Cuellar, as they appear in the daily *La Estrella de Panama* in its edition of 3 March this year — that is, less than 24 hours ago — which reads as follows:

> "Doctor Javier Perez de Cuellar described as highly encouraging the report of the Panamanian Foreign Minister on the peaceful activities of the Contadora Group, adding that 'what must be avoided is a diplomatic vacuum, because that invites adventurism'."

To ignore this appeal would have irreparable consequences for the future peace negotiations in Central America. Similarly, Nicaragua should abandon attempts to duplicate international efforts by involving the Security Council again, even though in the Contadora Group we have a specific committee to deal with matters of security concerning the countries of the region. That committee, incidentally, enjoys the support of the international community, as has again been expressed here. If Nicaragua continues to maintain this attitude, it will vitiate the functioning of the Contadora Group as a negotiating forum. That body, instead of being replaced, should be strengthened.

. . . .

Annex 61

DIPLOMATIC NOTES FROM THE GOVERNMENT OF HONDURAS TO THE GOVERNMENT OF NICARAGUA, OEA/SER.G, CP/INF.2012/83 (5 JULY 1983); OEA/SER.G, CP/INF.2016/83 (11 JULY 1983); OEA/SER.G, CP/INF.2187/84 (20 JULY 1984)

NOTE NO. 26/83 FROM THE PERMANENT MISSION OF HONDURAS TRANSCRIBING THE TEXT OF THE NOTE DATED JUNE 30, 1983, SENT BY THE MINISTER OF FOREIGN AFFAIRS OF HONDURAS TO THE MINISTER OF FOREIGN AFFAIRS OF NICARAGUA

No. 26/83/MPH/OEA/CP July 1, 1983.

Excellency:

I have the honor to address to convey to you, and through your kindness, to the representatives of the other member States on the Permanent Council, the text of the note sent by His Excellency Arnulfo Pineda López, Minister of Foreign Affairs of Honduras, to his Excellency the Minister of Foreign Affairs of Nicaragua. That note reads verbatim as follows:

> "Note No. 311 DA. Tegucigalpa, D.C. June 30, 1983. His Excellency Miguel d'Escoto Brockman, Minister of Foreign Affairs, Managua, Nicaragua. Excellency: I have the honor to address you in regard to Notes Nos. 331-DSM and 306-DA. dated June 21 and 24 from this Ministry. The respective Notes were in reference to the deaths of United States journalists Dial Torgerson and Richard Ernest Cross and to injuries suffered by a Honduran citizen, Francisco Edas Rodriguez, and to the blowing up of a truck. Both incidents occurred on the road between Cifuentes and Trojes. The Government of Honduras again wishes to register its most energetic protest as contained in those notes and after receiving the report of a Commission of Military Specialists appointed to conduct a thorough investigation of the incidents is fulfilling its obligation to clarify that the cause of the criminal assaults was not the firing of antitank grenades from Nicaragua as was initially believed. It has been confirmed that they were caused by the explosion of antitank and antipersonnel mines placed by the Sandinista forces on the Honduran highway with the perverse intent to cause this type of indiscriminate bloody act in open violation of the territorial integrity of Honduras.
>
> Accept, Excellency, the renewed assurances of my highest consideration."

Accept, Excellency, the renewed assurances of my highest consideration.

(Signed) Roberto RAMOS BUSTOS,
Chargé d'Affaires a.i.

NOTE NO. 29/83 FROM THE PERMANENT MISSION OF HONDURAS, TRANSCRIBING THE TEXT OF THE NOTE DATED JULY 8, 1983, SENT BY THE ACTING MINISTER OF FOREIGN AFFAIRS OF HONDURAS TO THE ACTING MINISTER OF FOREIGN AFFAIRS OF NICARAGUA

No. 29/83/MPH/OEA/CP July 11, 1983.

Excellency:

I have the honor to address Your Excellency to make known to you, and through your kindness to the representatives of the other member States on the Permanent Council, the text of a note sent by His Excellency Arnulfo Pineda López, Acting Minister of Foreign Affairs of Honduras, to Her Excellency the Acting Minister of Foreign Affairs of Nicaragua, which reads verbatim as follows:

> "Official Note No. 322 DA. Tegucigalpa, D.C., July 8, 1983. Excellency: I am addressing Your Excellency to inform you of the following facts: *(a)* On Sunday, July 3, at 16.00 hours, the Honduran soldier Roberto Meza Ramos, when returning from his guard duty near the La Vigia ravine, along the Las Trojes-Cifuentes highway, stepped on a mine, which blew off his right foot. *(b)* On Tuesday, July 5, at 10.00 hours, forces of the Sandinista People's Army opened fire on Honduran positions located in the same sector, trying to protect a patrol that was infiltrating near Cifuentes, possibly to continue mining the highway. *(c)* That same day, first at 20.40 hours and again at 22.15, the Sandinista forces harassed the Honduran positions with group fire and 81 mm. mortars. *(d)* Finally, at 9.45 hours on July 6, the Nicaraguan forces renewed the harassment with heavy weapons, causing a slight wound in the face of a Honduran soldier by fragments of rock impelled by the expansion wave of one of the projectiles. Once more, my Government is obliged energetically to protest these hostile acts of the Government of Nicaragua, which violate the sovereignty and the territorial integrity of Honduras, despite the fact that it is aware that, in accordance with your Note No. 103 of July 5, to detract from the serious charges made, Your Excellency will reply that they should be attributed to 'pro-Somoza or other mercenaries'. I consider that that is an easy way to unload responsibilities and to try to give some credibility to the latest propaganda maneuver of the Government of Nicaragua, in the sense that it is groups of anti-Sandinistas and the Honduran army itself that attack the Honduran population and territory for the sole purpose of blaming the Sandinista forces. I also believe, Madam Minister, that not even the great publicity resources the Nicaraguan Government has available will be sufficient to sustain such an unlikely plan of action. Accept, Excellency, the renewed assurances of my highest consideration. Arnulfo Pineda López, Acting Minister of Foreign Affairs."

Accept, Excellency the renewed assurances of my highest consideration.

(Signed) Roberto MARTÍNEZ ORDÓÑEZ,
Ambassador.

NOTE NO. 23/84 FROM THE AMBASSADOR, PERMANENT REPRESENTATIVE OF HONDURAS CONVEYING THE TEXT OF THE NOTE SENT BY THE MINISTER OF FOREIGN AFFAIRS OF HIS GOVERNMENT TO THE MINISTER OF FOREIGN AFFAIRS OF NICARAGUA, DATED JULY 17, 1984

No. 23/84/MPH/OEA/CP. July 19, 1984.

Excellency:

I have the honor to address Your Excellency to convey to you and, through you, to the member States on the Permanent Council, the text of the note sent by the Minister of Foreign Affairs of Honduras, Dr. Edgardo Paz Barnica, to the Minister of Foreign Affairs of Nicaragua. The text is as follows:

> "Note No. 427 DA. Tegucigalpa, D.C. 17 July 1984. His Excellency, Mr. Miguel d'Escoto Brockman, Minister of Foreign Affairs, Managua, Nicaragua. Excellency: I have the honor to address Your Excellency to inform you that on July 2 of this year, at 2.00 p.m., a patrol made up of six members of the Sandinista People's Army entered Honduran territory and penetrated as far as the ranch house on the La Caoa ranch, owned by Mrs. Modesta V. de Mourra. The ranch is located within the jurisdiction of the Municipality of San Marcos de Colon, Department of Choluteca. There were three Honduran soldiers inside the ranch house, so that an exchange of fire ensued. One member of the foreign troops was downed and was taken back to Nicaragua by his companions. The Government of Honduras vehemently protests this new aggression on the part of the Sandinista army and wishes to point out that the peace that our peoples demand and aspire to cannot be achieved with attitudes of this kind. Accept, Excellency, the renewed assurances of my highest consideration. Edgardo Paz Barnica, Minister of Foreign Affairs."

Accept, Excellency, the renewed assurances of my highest consideration.

(Signed) Roberto MARTÍNEZ ORDÓÑEZ,
Ambassador.

Annex 62

HONDURAN MINISTRY OF FOREIGN RELATIONS, *RESUMÉ OF SANDINISTA AGGRESSIONS IN HONDURAN TERRITORY IN 1982*, FROM THE EMBASSY OF HONDURAS TO THE UNITED STATES OF AMERICA, 23 AUGUST 1982

The Minister of Foreign Relations, Dr. Edgardo Paz Barnica, has once again addressed himself today to Their Excellencies Noel Door and Hilarion Cardozo, President of the Security Council of the United Nations and of the Permanent Council of the Organization of American States, respectively, and has sent them a document containing a resumé of the violations to our territory, the harassments, kidnappings, attacks and personal aggressions against Honduran citizens which have been caused by elements of the army, air force and naval force of the Government of the Republic of Nicaragua during the period between January 30 and August 21 of this year.

Upon deploring such lamentable actions, the Foreign Minister reiterates the will of the Government of Honduras to establish serious and constructive dialogues to put in practice the Honduran peace plan presented on March 23 of this year before the Permanent Council of the Organization of American States and calls upon the honorable dignataries above mentioned, recipients of the notes, to encourage the use, on the part of Nicaragua, of diplomatic means to promote and ensure peace in the Central American region.

Tegucigalpa, D.C., August 23, 1982.

Press and Information Office, Honduran Ministry of Foreign Relations.

RESUMÉ OF SANDINISTA AGGRESSIONS IN HONDURAN TERRITORY YEAR 1982

Month and Date	*Incidents*	*Place*	*Name and Victim*
January 30	A Sandinista patrol pursuing some smugglers penetrated Honduran territory. Afterwards, it encountered a Honduran patrol interchanging gun fire for about 5 minutes.	Sector of Palo Verde. Coordinates (0757) Chart Concepcion de Maria, Department of Choluteca.	
March 4	Elements of the Sandinista Armed Forces penetrated	Sector of Guapinol.	Kidnapped: Cornelio Rubio

Month and Date	*Incidents*	*Place*	*Name and Victim*
	the sector of Guapinol, kidnapping the Honduran citizens Cornelio Rubio and Daniel Gonzalez, taking also their boat. Violation of Honduran Territorial Waters — kidnapping.	Coordinates (5447) Chart Punta Condega.	and Daniel Gonzalez.
March 17	At eleven hours Sandinista elements attacked members of the Honduran Naval Forces wounding Corporal Mario Roberto Ramos. Violation of Honduran territorial waters. Aggression to a Honduran patrol	Coordinates: 13 05′ 45″ Latitude North 87 38′ 38″ Longitude West Pacific waters.	Wounded: Mario Roberto Ramos.
March 17	In hours of the afternoon two Honduran boats were captured in its territorial waters opposite the Misquita village of Irlaya. A Nicaraguan coastguard boat bombarded the Honduran vessel *Debbie K*, taking with them the captain and 24 fishermen. Violation of Honduran territorial waters — kidnapping.	Community of Irlaya, left margin of river Segovia, Cape Gracias a Dios.	
March 17	The fishing boat *Baby Jones* was attacked by a Nicaraguan vessel. The Honduras boat was towed with all its crew members aboard to a Nicaraguan port.	Zone of Media Luna bank prolongation south-west of Key Babell.	Kidnapped: Longino Cruz, Ligio Ordonez, Horacio Sandino, Rene Flores, Abeles Ramos, Donat Laiman, Antonio Acostlino Taylor, Tito Porcelano, Bernardo Willis and José Angel.
March 18	Sandinista elements penetrated to the community of Raya, 30	Community of Raya, 30 miles inside Honduran	Kidnapped: 48 lobster fishermen.

Month and Date	*Incidents*	*Place*	*Name and Victim*
	miles inside Honduran waters capturing 48 lobster fishermen and the boat *Derveeqee*, taking them kidnapped towards Nicaraguan waters; their whereabouts unknown. Violation Honduran territorial waters — kidnapping.	waters in the Atlantic.	
March 21	This day at 14 hours the Naval Base in Puerto Cortes received communication from the Naval Base in the Swan Islands stating that Sandinista army patrol boats penetrated Honduran waters, capturing 4 Honduran fishing boats which were taken toward Puerto Cabezas in Nicaragua. Violation Honduran territorial waters — attacking and kidnapping of Honduran boats.	Keys Babel and Media Luna — 16 miles north of parallel 15.	
April 2	Today at 2.00 p.m. a Sandinista army patrol kidnapped 5 Honduran natives of Cedral Municipality of El Triunfo. Violation Honduran territorial waters and kidnapping.	Sector Las Cuatro Esquinas, jurisdiction of El Triunfo, Department of Choluteca.	Kidnapped: Maria Antonia Guevara (55 years), Teodoro Vasquez (70 years), Santos Ruvilio Espinal (13 years), Juana Antonia Aguilar (14 years), Maria Cristina Espinal (7 years).
April 3	Elements of the Sandinista Front kidnapped a young man by the name of Aurelio Amador. Violation Honduran territory and kidnapping.	Municipality of El Triunfo, jurisdiction of Choluteca.	Kidnapped: Aurelio Amador.
April 3	At 8.00 a.m. a combat plane belonging to the	Sector of the Madrigales Post,	

Month and Date	*Incidents*	*Place*	*Name and Victim*
	Nicaraguan Air Force entered Honduran territory, overflying on various occasions the fiscal post at Madrigales. Violation air space.	jurisdiction of the Municipality of Concepcion de Maria.	
April 4	21 Nicaraguans were captured inside Honduran territory. Violation Honduran territory.	Sector 1.A Ceiba — 4 kilometers south of El Guasaule.	
April 11	The Honduran boat *Tnambo* with its captain and crew was captured in Honduran waters by Sandinista Front patrol boat. Violation Honduran territorial waters and kidnapping.	Sector Key Media Luna	Kidnapped: Captain Heriberto Echeverria. 3 sailors, 13 divers, 8 oarsmen.
April 18	A Honduran vessel is attacked with individual automatic firearms. Violation of Honduran territorial waters and aggression.	Sector named Beach Punta San José.	
May 16	A Sandinista army patrol entered Honduran territory up to the community of Caguasca, kidnapping Francisco Lopez Vasquez, who was later murdered. Violation of Honduran territory, kidnapping and murder.	Sector of Caguasca, jurisdiction of San Marcos de Colon, Department of Choluteca.	Murdered: Francisco Lopez Vasquez.
June 1	A Sandinista patrol entered Honduran territory, kidnapped a Honduran peasant-shepherd by the name of Teofilo Ramirez, who was taken to the "La Barraca" jail in Esteli, Nicaragua. Violation Honduran territory and kidnapping.	Community of Oyoto, jurisdiction of San Marcos de Colon, Department of Choluteca.	Kidnapped: Teofilo Ramirez.

Month and Date	*Incidents*	*Place*	*Name and Victim*
June 3	The Sandinista Popular Army attacked a Honduran patrol that was on routine border duty. Harassment against a Honduran border patrol	Community of El Coyol.	
June 30	A Sandinista patrol penetrated to the village El Anonal, killing a Honduran peasant. Violation of Honduran territory and murder.	Community of El Anonal, Department of Choluteca.	Dead : Adolfo Lopez Betanco.
July 15	The Honduran boat *Bonne Soire*, owned by Mr. Santos Edgardo Haylock Arrechavala, is captured in the Media Luna Keys. The boat, together with its crew, is taken away. Violation of Honduran territorial waters and kidnapping.	Keys Media Luna, Atlantic Coast of Honduras.	
July 15	Seven (7) Honduran sailors are captured and towed in their own boat toward Puerto Cabezas in Nicaragua, and taken to the jail of "Zona Franca Managua". Violation of Honduran territorial waters and kidnapping.	Keys Babel Honduras waters.	Kidnapped : Harry Isabel Rosales, Salomon Calderon Chavez, Justino Melara, Tomas Melara Garcia, Rubi Lopez Hailo, Victor Manuel Arias and Amado Gomez Alvarez.
July 15	Sandinista patrols using long and medium range weapons open fire on Honduran villages. Aggression wounding many persons.	Communities : La Guaruma and El Alto, villages of the Department of Choluteca.	Wounded : Jorge Alberto Garcia, Medardo Izaguirre Rodriguez, Amado Maradiaga Cardenas, Romualdo Maradiaga and Marcelino Maradiaga.
July 17	Sandinista combat planes	Communities:	

Month and Date	*Incidents*	*Place*	*Name and Victim*
	overfly Honduran villages. Violation air space.	Arenales and Sabana Redonda, Department of El Paraiso.	
July 20	Sandinista Popular Army patrol enters Honduran territory. Upon its being intercepted by Honduran Army elements, heavy exchange of fire takes place. Sandinista patrol returns to Nicaraguan territory from where it continues to fire. Violation Honduran territory. Harassment to Honduran villages and aggression to Honduran army.	Community: La Ceiba, west of border post of Gausaule, Department of Choluteca.	
July 20	Elements belonging to the Sandinista Navy capture, inside Honduran waters, the ship *Lady Madeleine*. This ship supplies food, fuel and men to the seafood flotilla belonging to Mariscos Ceiba S.A. de R.L. The ship was taken to Port Bluefields in Nicaragua where its 99 crew members were freed. Violation Honduran territorial waters and kidnapping.		
August 1	Two Nicaraguan combat planes entered the sector of Ahuasbila in Honduran territory. They flew away after Honduran army elements in the area fired at them. Violation air space.	Community of Ahuasbila, Department of Gracias a Dios.	
August 4	Sandinista Popular Army combat planes overfly Honduran territory. Violation air space.	San Marcos de Colon.	
August 5	Elements of Sandinista	Communities of	

Month and Date	*Incidents*	*Place*	*Name and Victim*
	Popular Army attacked Honduran communities with K 75 and K 76 rifles, 60 mm mortars and 50 mm machine guns. Harassment to communities with short and long range weapons.	La Guaruma, El Alto and La Palmita, chart Concepcion de Maria, Department of Choluteca.	
August 6	The Corporal in charge of the post at El Oyoto informs that on this date at 7.14 p.m. 10 Sandinista elements arrived at his home, broke down the door with their rifle butts, aiming their guns at his family and hitting him with their rifles. They returned to Nicaragua after they stole his regulation weapon, home utilities, clothing, food and 260.00 Lempiras cash. Violation of Honduran territory, breaking into home, aggression and theft.	Community of El Oyoto. Coordinates (2790) San Marcos de Colon.	
August 6	Again the communities of La Guaruma, El Alto and La Palmita were attacked. These attacks took place at 7.00 a.m., 12.30 and 4.00 p.m. utilizing 82 and 60 mm mortars and 50 mm machine guns. Attacks and harassment to Honduran territory.	Communities: La Guaruma, El Alto and La Palmita, chart Concepcion de Maria, Department of Choluteca.	
August 7	Sandinista elements penetrated one and one half kilometers inside Honduran territory up to the Hacienda San Enriqué. Violation Honduran territory.	Hacienda San Enriqué, Department of Choluteca.	
August 10	Two Sandinista Air Force combat planes overflew	Community of Palo Verde, chart	

Month and Date	*Incidents*	*Place*	*Name and Victim*
	the sector of Palo Verde and then flew towards the city of Choluteca in Honduran territory. Violation air space.	Concepcion de Maria.	
August 10	Two Sandinista Air Force combat planes and one reconnaissance plane overflew the community of Duyusupo. Violation air space.	Community of Duyusupo (2475), chart of San Marcos de Colon.	
August 10	A Sandinista Air Force combat plane overflew the border post of La Fraternidad, entered Honduran territory and then returned to Nicaragua. Violation air space.	La Fraternidad (298611), Department of Choluteca.	
August 13	On this date at 8.00 p.m. armed individuals of Nicaraguan nationality entered the village of La Pena in Honduran territory and captured and took away the Nicaraguan citizen Avelio Mondragon. Violation Honduran territory and kidnapping.	Village of La Pena, Municipality of El Triunfo, Department of Choluteca.	Kidnapped: Avelio Mondragon.
August 20	On this date at 3.20 p.m. a Sandinista patrol entered the vicinity of Palo Verde. A five minutes interchange of fire was held with elements of a Honduran patrol. Violation Honduran territory, harassment to a Honduran patrol.	Community of Palo Verde. Coordinates (0657) chart Concepcion de Maria, Department of Choluteca.	
August 21	On this date at 9.00 a.m. elements of the Sandinista Popular Army placed themselves alongside the border with Honduras in the sector of Palo Verde. The Sandinista group	Community of Palo Verde, chart Concepcion de Maria, Department of Choluteca.	

Month and Date	Incidents	Place	Name and Victim
	began firing towards Honduras and our army was forced to answer their fire. Attack to Honduran territory and harassment to the Honduran army.		

Annex 63

DIPLOMATIC NOTES FROM THE GOVERNMENT OF COSTA RICA TO THE GOVERNMENT OF NICARAGUA, OEA/SER.G, CP/INF.2050/83 (30 SEPTEMBER 1983); OEA/SER.G, CP/INF.2132/84 (29 FEBRUARY 1984); OEA/SER.G, CP/INF.2152/84 (24 APRIL 1984)

NOTE NO. OEA-626 FROM THE PERMANENT MISSION OF COSTA RICA ATTACHING THE NOTE OF SEPTEMBER 30, 1983, FROM THE GOVERNMENT OF COSTA RICA TO THE MINISTRY OF FOREIGN AFFAIRS OF NICARAGUA

October 3, 1983.

Excellency:

I have the honor to address Your Excellency to ask that you kindly circulate to the distinguished members of the Missions and Delegations the note dated September 30, 1983, from my Government to the Ministry of Foreign Affairs of Nicaragua.

Accept, Excellency, the renewed assurances of my highest consideration.

(Signed) Luis E. GUARDIA,
Acting Representative.

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30 September 1983.

Excellency:

The Government of Costa Rica condemns and repudiates with profound indignation the attack on Costa Rican territory, on members of the armed forces of Costa Rica and on the country's installations at the Peñas Blancas border post carried out by the Sandinista Popular Army with the evident purpose of attacking us.

It was a gratuitous aggression, which demonstrates the hostility of the Government of Nicaragua, an attitude already manifested by other acts committed against Costa Rica's sovereignty and territorial integrity.

In presenting this protest, in anger, to the honorable Government of Nicaragua, the Government of Costa Rica wishes it to know that the attack has seriously and adversely affected diplomatic relations between the two countries. Unless the Government of Nicaragua displays clear and unmistakable signs that it will in all ways and in all places honor the rules of international law regulating conduct between civilized States, relations cannot return to a status favorable to honorable comportment.

Costa Rica will permit no other action by the Nicaraguan Government in violation of the country's most sacred rights.

Accept, Excellency, the renewed assurances of my highest consideration.

(Signed) Fernando VOLIO JIMÉNEZ,
Minister of Foreign Affairs and Worship.

NOTE FROM THE PERMANENT MISSION OF COSTA RICA, TRANSMITTING THE TEXT OF THE NOTE SENT BY THE MINISTER OF FOREIGN AFFAIRS AND WORSHIP OF COSTA RICA TO THE MINISTER OF FOREIGN AFFAIRS OF NICARAGUA, ON EVENTS THAT OCCURRED ON FEBRUARY 23, 1984

March 1, 1984.

Excellency:

I have the honor to transmit to Your Excellency, for your information and the appropriate purposes, a copy of the note dated February 29, 1984, addressed to the Secretary-General of the Organization by the Acting Representative of Costa Rica, enclosing the text of the note sent by the Minister of Foreign Affairs and Worship of Costa Rica to the Minister of Foreign Affairs of Nicaragua, on events that occurred on February 23.

Accept, Excellency, the renewed assurances of my highest consideration.

(Signed) Val T. MCCOMIE,
Assistant Secretary General,
Officer in charge of the General Secretariat.

OEA-No. 107
February 29, 1984.

Excellency:

I have the honor to address Your Excellency to send you herewith the text of a note addressed by the Minister of Foreign Affairs and Worship of Costa Rica, Dr. Carlos José Gutiérrez, to the Minister of Foreign Affairs of Nicaragua, Mr. Miguel d'Escoto Brockman.

That note describes the serious events that occurred on February 23, 1984, when members of the Rural Guard of Costa Rica, in Conventillos, were attacked with heavy weapons from Nicaraguan territory by members of the Sandinista People's Army, while the former were making an investigation of cattle smuggling in Costa Rican territory.

I shall appreciate it if Your Excellency will make these events known to the Ambassadors, Permanent Representatives of the member States, and the Observers to the Organization of American States.

Accept, Excellency, the renewed assurances of my highest consideration.

(Signed) Luis E. GUARDIA,
Acting Representative.

San José, February 28, 1984.

Excellency:

I must address Your Excellency to inform you of the serious events that occurred last February 23, between 11.00 a.m. and 12.00 noon, when members of the Sandinista People's Army attacked Costa Rican territory in the border zone of Conventillos with fifty-caliber machine-gun fire and eighty-two-millimeter mortar fire, seriously endangering the lives of members of the Costa Rican Rural Guard, who were carrying on patrol work.

For the purpose of avoiding a confrontation, the Costa Rican patrol chose to withdraw. The intense fire continued for more than forty-five minutes and left as evidence numerous impacts of mortar shells, some of them located more than one thousand meters from the border line, within the national territory. In addition, as a result of this attack, more than forty-five hectares of pastures of the Conventillos farm were burned.

I must emphasize to Your Excellency that the border line, in the zone where the attack occurred, is duly marked and that the Costa Rican patrol was doing regular lookout work in full daylight, to prevent smuggling.

The distinguished Government of Nicaragua cannot expect that, in the face of the incomprehensible events that have occurred, the Government of Costa Rica will maintain the patient and conciliatory attitude that it has maintained until now as a contribution to the pacification of the region. These events constitute a flagrant violation of the national territory, for which reason I must present a most vigorous protest to Your Excellency's distinguished Government, and state to you that they place in doubt the sincerity of the intentions of the Government of Nicaragua to reduce tension in the area.

I likewise believe it appropriate to inform Your Excellency that, as a consequence of the events mentioned, the Government of Costa Rica has decided to postpone the meeting of the Mixed Committee that was going to be held in the beginning of the coming month of March, as well as to recall the Ambassador of Costa Rica to Nicaragua for consultation.

Finally, I must make Your Excellency see that, firm as the will of the Government of Costa Rica to support all efforts for bringing peace to Central America is, it considers that an essential condition of that attitude is absolute respect for the territorial integrity of the country, to defend which it will resort to such means as it deems necessary.

Accept, Excellency, the renewed assurances of my highest consideration.

(Signed) Carlos José GUTIÉRREZ.

February 28, 1984.

Knowing that Your Excellency is meeting with the other ministers of foreign affairs of the Contadora Group, it seems to me very important that you gentlemen study the danger to peace in Central America represented by acts of aggression such as that I referred to in my protest note.

The Government of Costa Rica maintains its firm will to cooperate with the effort of pacification you gentlemen are making. But in no way can it permit or ignore acts of open aggression against its nationals, members of its public force, or its territory.

Accept, Excellency the renewed assurances of my highest consideration.

(Signed) Carlos José GUTIÉRREZ,
Minister of Foreign Affairs and Worship.

TEXT OF THE MESSAGE FROM THE MINISTER OF FOREIGN AFFAIRS AND WORSHIP OF COSTA RICA TO THE ACTING MINISTER OF FOREIGN AFFAIRS OF NICARAGUA ON APRIL 23, 1984

No. OEA-345
April 25, 1984.

Excellency:

I have the honor to convey to Your Excellency the text of the message dated April 23 from His Excellency Dr. Carlos José Gutiérrez, Minister of Foreign Affairs and Worship of Costa Rica, to His Excellency Victor Hugo Tinoco, Acting Minister of Foreign Affairs of Nicaragua, in connection with the serious events that took place on April 17 and 19 last.

I should be grateful if Your Excellency would kindly distribute the enclosed text to the member delegations of the Organization as soon as possible.

Accept, Excellency, the renewed assurances of my highest consideration.

(Signed) Claudio Antonio VOLIO,
Ambassador, Permanent Representative
of Costa Rica.

April 24, 1984.

(Copied below is the text of the message sent yesterday by the Minister of Foreign Affairs and Worship of Costa Rica, Dr. Carlos José Gutiérrez, to His Excellency Victor Hugo Tinoco, Acting Minister of Foreign Affairs of Nicaragua:)

"His Excellency
Victor Hugo Tinoco,
Acting Minister of Foreign Affairs,
Managua, Nicaragua

Excellency:

I must write to Your Excellency at this time to inform you of the serious events that took place on April 17 and 19 last. On April 17, at 15.40 hours, members of the Sandinista People's Army stationed in Pimienta, in the Peñas Blancas border area, directed mortar fire into Costa Rican territory. The mortar shells hit the small hill called 'La Pimienta', some 400 meters from the border between the two countries, which is properly marked with boundary markers, and only two meters from the Inter-American Highway, throwing stones up on the shoulder of the main route between Costa Rica and Nicaragua.

At the moment these serious incidents occurred, an automobile, with national license plate No. 55391, was passing along the highway barely 25 meters from the place where the shells hit, in the direction of Peñas Blancas. The lives of the Costa Rican passengers in the car, José R. Centeno Alarcon and Marianela Alarcon Saenz, were placed in serious danger. At 15.55 hours, when properly identified members of the Costa Rican Civil Guard stationed at the 'Hacienda el Valle' post proceeded to inspect the scene, they were attacked with machine-gun fire for approximately six minutes by elements of the Sandinista People's Army.

When the civil guard detachment decided to fall back, they were again attacked by part of the Sandinista People's Army for approximately 3 minutes.

On 19 April, at 16.15 hours, a 'push and pull' aircraft of the Sandinista Air Force violated Costa Rican territorial air space. The aircraft made a deliberate attack on the Costa Rican Civil Guard garrison in a place known as Delta Costa Rica, near Barra de Colorado, firing 70 mm rockets and machine guns. The shells fell barely 20 meters away from the post, which is properly identified with the Costa Rican flag. Over and above the material damage caused, the attack might have cost the lives of the guardsmen stationed in the garrison.

Since there was no justifiable reason at all for these serious attacks, the Government of Costa Rica hereby presents its most forceful protest, and trusts that the Government of Nicaragua will conduct an investigation of the events, sanction those responsible, and take steps to ensure that acts such as those described here do not occur again, and to provide the satisfaction required by law.

Accept, Excellency, the renewed assurances of my highest consideration.

(Signed) Carlos José GUTIÉRREZ,
Minister of Foreign Affairs and Worship."

Annex 64

DIPLOMATIC NOTE FROM GOVERNMENT OF COSTA RICA TO FOREIGN MINISTERS OF COLOMBIA, MEXICO, PANAMA AND VENEZUELA, 2 MAY 1984

Department of State, Division of Language Services

(Translation)

LS No. 113664
WD/BP
Spanish.

San José, May 2, 1984.

Mr. Minister:

I have the honor to inform Your Excellency of a new attack by members of the Sandinista Air Force, on Sunday, April 29, 1984, from 7.50 a.m. to 8.30 a.m., in which two of its aircraft overflew Costa Rican territory firing rockets at the village of San Isidro de Pocosol, located 3 km from the boundary between Nicaragua and Costa Rica.

I did not know of this attack, which I am reporting now, on Monday the 30th when, at the meeting of foreign ministers of the Contadora Group and Central America, I referred to the numerous aggressions carried out against Costa Rican territory by military personnel of the Government of Nicaragua and requested, on behalf of my Government, action by the governments composing the Contadora Group.

This latest occurrence, the most serious incident to have taken place in the last two years, has brought relations with Nicaragua to their lowest ebb and confirms the hardening of the position of the Government of Nicaragua towards the Government of Costa Rica.

In view of the foregoing, I request your Government to consider, together with the other governments forming the Contadora Group, the dispatch of a mission of observers that could make an on-site verification of the serious aggression to which I have referred. Given the urgency and gravity of the situation, this mission could be composed of the military attachés of the diplomatic missions of each of the countries of the Group in Costa Rica.

Furthermore, in view of the dangerous course that events have taken, I request you to advance the date of the visit which you were planning to make to Costa Rica in the company of the other Ministers of Foreign Affairs.

Finally, I reiterate to Your Excellency the firm desire of the Government of Costa Rica that the Contadora Group should be the body to achieve a definitive solution to this grave problem within the framework of the negotiations to bring peace to the region.

I avail myself of this opportunity to reiterate to Your Excellency the assurances of my highest consideration.

(Signed) Carlos José GUTIÉRREZ.

Annex 65

"UNDER SALVADOR'S DUARTE, DEATH SQUAD KILLINGS FALL", *CHRISTIAN SCIENCE MONITOR*, 10 AUGUST 1984

[Not reproduced]

Annex 66

EDITORIAL, "THE DUARTE DIFFERENCE", *NEW YORK TIMES*, 2 AUGUST 1984

[Not reproduced]

Annex 67

"PROGRAM OF THE JUNTA OF THE GOVERNMENT OF NATIONAL RECONSTRUCTION OF NICARAGUA", 9 JULY 1979

After 45 years of Somozan genocidal tyranny and of constant struggle by the Nicaraguan people, a struggle which has lately reached high levels of patriotism and political consciousness, of sacrifice and heroism, and of organization and politico-military mobilization in a popular and nationalist revolution of unique and original qualities based on the example and thoughts of Sandino, the hour of national liberation has come, along with the task of forging the new Nicaragua.

The genocide of our people and the destruction of our cities at the hands of the Somoza dictatorship, the suffering of the civilian population from criminal bombing, the heroism of the Sandinista troops and the Nicaraguan masses, the efforts of all sectors of the country in the struggle against the dictatorship, and the thousands of martyrs and heroes who have fallen in the fight for justice and freedom commit the entire Nicaraguan nation to the political, economic, social, moral, and cultural reconstruction, development, and transformation of the homeland.

Responding to this patriotic commitment, the GRN Junta, with the support of the Frente Sandinista de Liberacion Nacional (Sandinista National Liberation Front) (FSLN), has drawn up a program of government that is responsive to the aspirations of all Sandino's people.

This program of government, to be implemented during the interim period of national reconstruction, lays the foundations of the new Nicaragua and of a democratic State based on the principle of social justice. It also initiates a revolutionary and nationalist process of profound changes which will grant to all sectors of the country full participation in the political structures, the national reconstruction, the integral development of the nation, and the transformation of Nicaraguan society.

The GRN Junta considers it appropriate to inform the public of the following broad outlines of its program of government in the political, economic, and social domains:

I. Political domain

1.1. Establishment of a government based on democracy, justice and social progress.

The necessary legislation will be enacted for the organization of a truly democratic government of justice and social progress that fully guarantees the right of all Nicaraguans to political participation and universal suffrage. The organization and operation of political parties will also be guaranteed without ideological discrimination, with the exception of parties and organizations advocating the return of the Somoza régime.

1.2. Bases for organizing the State.

(a) *Executive power:*

The GRN Junta will be responsible for the executive and administrative branches of the State. The Junta will fulfill its duties for the time required to lay the foundations for the genuine democratic development of Nicaragua, supported by the full participation of the people and by the practical application of the concepts and proposals outlined in point 1.1 of this program.

(b) *Legislative power:*

A Council of State will be established and will share the legislative functions with the Junta. The Council will ensure full representation to the political, economic, and social forces that helped to overthrow the Somoza dictatorship.

The Council of State will be composed of 30 members, directly representing and appointed by the following political organizations and socio-economic groups:

(1) FSLN
(2) From the Frente Patriótico Nacional (National Patriotic Front):

    Movimiento Pueblo, Unido (United Popular Movement)
    Partido Liberal Independiente (Independent Liberal Party)
    Agrupación de los Doce (Group of 12)
    Partido Popular Social Cristiano (People's Social Christian Party)
    Central de Trabajadores de Nicaragua (Nicaraguan Labor Confederation) (CTN)
    Frente Obrero (Labor Front)
    Sindicato de Radioperiodistas (News Commentators' Union)

(3) From the Frente Amplio Opositor (Broad Opposition Front) (FAO):

    Partido Conservador Democratico (Democratic Conservative Party)
    Partido Social Cristiano Nicaragüense (Nicaraguan Social Christian Party)
    Confederación General de Trabajo Independiente (Independent General Labor Confederation)
    Confederacion de Unificación Sindical (Labor Unification Confederation) (CUS)

(4) From the Consejo Superior de la Emprese Privada (Council of Private Enterprise) (COSEP):

    Instituto Nicaragüense de Desarrollo (Nicaraguan Development Institute) (INDE)
    Camera de Industrias de Nicaragua (Nicaraguan Chamber of Industry) (CADIN)
    Confederación de Cámaras de Comercio de Nicaragua (Nicaraguan Confederation of Chambers of Commerce)
    Union de Productores Agropecuarios de Nicaragua (Nicaraguan Union of Farmers and Cattlemen) (UPANIC)
    Cámara Nicaragüense de la Construcion (Nicaraguan Construction Association)
    Confederación de Asociaciones Profesionales de Nicaragua (Nicaraguan Confederation of Professional Associations) (CONAPRO)

(5) Universidad Nacional Autónoma de Nicaragua (National Autonomous University of Nicaragua) (UNAN)

(6) Asociación Nacional del Clero (National Association of the Clergy)

(c) *Judicial power:*

The Supreme Court of Justice will be organized as the highest judicial authority. The number of members, internal organization and specific functions will be determined in due time.

The judicial branch will have exclusive jurisdiction, will function with the required degree of competence and independent judgment of its members, will re-establish the proper application of justice, and will guarantee citizens the full exercise of their rights.

Additional provisions required to ensure adequate compliance with the responsibilities and attributions of the judicial branch will be adopted.

1.3. Full guaranty of human rights.

The human rights set forth in the United Nations Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man (OAS) are fully guaranteed.

1.4. Fundamental liberties.

Bearing in mind the special circumstances with which the country is confronted at the present time, the following basic freedoms will be specially guaranteed:

Free expression, reporting, and dissemination of thought. Any law which represses the free expression and dissemination of thought and the freedom of information will be repealed.

Freedom of religion. Full exercise of the freedom of religion will be guaranteed.

Freedom to organize trade and labor unions and organizations of the people. Legislation will be enacted and action taken to guarantee and promote the freedom to organize trade and labor unions and organization of the people both in the cities and in rural areas.

1.5. Repeal of repressive laws.

All repressive laws will be repealed, especially those which threaten the dignity and the integrity of individuals and result in assassinations, disappearances, torture, illegal capture and search and seizure.

1.6. Abolition of repressive institutions.

All repressive institutions will be abolished, such as the Oficina de Seguridad Nacional (Office of National Security) (OSN) and the Servicio de Inteligencia Militar (Military Intelligence Service), which have been used for the political repression of the people and their organizations.

1.7. Eradication of the corruption of the dictatorship.

The corruption which has characterized the Somoza dictatorship will be eradicated: fraudulent appropriation of property, smuggling, illicit tax exemptions and waivers, fraudulent tenders, fraudulent real estate transactions, misappropriation of State funds, unlawful loans, loan fees and other illegal transactions. Administrative honesty and the integrity of public servants will be the basic standards of public administration.

1.8. Application of justice.

Members of the military and civilians involved in crimes against the people, in the misappropriation of State funds, and in other unlawful acts will be brought before the courts of justice.

1.9. Revocation of illegal trials and judgments.

All trials by illegal court-martial will be set aside, and their decisions rendered null and void. All political prisoners will be freed, and all those in exile will be welcomed home.

1.10. Municipal autonomy.

Legislation will be enacted which guarantees the full and effective autonomy of the municipalities. Municipal authorities will be freely elected by the people, and the municipality of Managua will be re-established.

1.11. Elimination of the Somoza power structure.

The entire Somoza power structure will be eliminated and replaced by new democratic structures in accordance with legislation to be enacted to that end and with the content of this program.

1.12. Organization of a new Nicaraguan Army.

A new Nicaraguan Army will be organized. Its fundamental role will be to defend the democratic process, the sovereignty and independence of the nation, and the integrity of the Nicaraguan territory. It will be composed of FLSN combatants; of enlisted men and officers who conducted themselves with honesty and patriotism despite corruption, repression and national betrayal by the dictatorship; of those who joined the struggle for the overthrow of the Somoza régime; of all sectors of the country which fought for liberation and wish to join the new army; and by physically fit citizens who fulfill their military obligation when called upon to do so. Corrupt soldiers guilty of crimes against the people will have no place in this army.

Members of the army will not be permitted to engage in electoral campaign activities, but they will be allowed to exercise their political rights as citizens.

The army will be mindful at all times of the needs of the civilian population, and will participate actively in the tasks of reconstruction and development. Its members will be trained in various areas of technical or professional specialization. There will be obligatory military service and a minimum number of permanent commissioned and non-commissioned officers in order to ensure the proper performance of its functions at all times. Personnel will be gradually demobilized to the extent that and at such time as there is assurance that the national sovereignty is adequately protected and that no belligerent military forces remain from the Somoza régime.

1.13. National police.

The national police will be subject to a special regulatory structure which takes into account its civic functions and its duty to protect the citizenry.

1.14. Independent foreign policy.

An independent foreign policy of non-alignment will be followed, linking our country with all nations which respect self-determination and fair and mutually beneficial economic relations. In accordance with these principles, diplomatic and commercial relations will be maintained with those countries which respect Nicaragua's internal revolutionary process. New markets will also be sought, as well as solidarity with the democratic nations of Latin America and the rest of the world.

1.15. Return of Nicaraguans residing abroad.

A policy of repatriating Nicaraguans residing abroad will be established in order to use their knowledge and experience to serve the country and to allow them to participate actively in the tasks of reconstruction and development.

II. Economic domain

2.1. Objectives.

In addition to the action required to meet the needs occasioned by the emergency and to bring about the reconstruction of the country, the following economic objectives will be pursued:

1. Internal changes.

A process of internal changes will be initiated in key sectors of the economy, such as agriculture, the financial system, the organization of foreign trade and living conditions in the rural and urban sectors.

2. Reactivation and stabilization of the economy.

The economy will be immediately reactivated and stabilized, which will make it necessary to reduce the imbalance in commercial transactions with the rest of the world and to resolve the problems occasioned by massive foreign indebtedness. The monetary and fiscal policies will be redirected so that inflation and unemployment can be effectively combatted. In general, the economic and social forces of the country will be united and coordinated around common goals.

3. Formation of a mixed economy.

Gradual progress toward a mixed economy, in which the following would coexist: a public ownership sector under State control, of precise scope and clearly delimited characteristics, whose principal features are defined below; a private sector; and a third sector characterized by joint or coordinated public- and private-sector investment.

4. Individual and collective participation.

The replacement of the traditional paternalistic principles of government in the economic field by government action that promotes and stimulates individual and collective participation by all Nicaraguans in the solution of their own problems.

The following measures will be adopted in accordance with the objectives just outlined:

2.2. Immediate action plans.

In the immediate short term and on an emergency basis, the following plans of action will be formulated and implemented:

(1) An emergency plan chiefly designed to meet the basic needs of the population:

(a) availability and distribution of food;
(b) the economic situation of families directly affected or broken up by the war;
(c) the reconstruction of cities, towns, and suburbs;
(d) nutrition and health;
(e) efficient reorganization and operation of public services: transport, energy, water, communications.

(2) An immediate economic recovery plan designed to promote the reactivation and stabilization of the national economy. This plan would have to include specific measures or programs, mainly in the following areas: employment; agricultural and industrial production; monetary and exchange policy; foreign trade; tax policy and public spending; renegotiation of the foreign public debt; new loan policy guidelines; financing policy for development; and services.

2.3. Plan for social and economic reconstruction, transformation and development.

A medium-term plan for social and economic reconstruction, transformation and development will be drawn up for the purpose of substantially improving the standard and quality of life of our people through increased national production and an equitable distribution of wealth. This plan will involve all sectors of the nation in national reconstruction and the country's full development. The sectoral plans mentioned in this program will be a part of it.

2.4. Patrimony for national reconstruction (Patrimonio de Reconstruccion Nacional).

The Patrimony for National Reconstruction will be created as an area of State and public property and action, based on the recovery of all properties usurped by the Somoza family and its supporters. The patrimony will be used chiefly to address the backwardness, poverty and unemployment suffered by the great majority. It will be managed by a national trust before being transferred to the State agencies designated by the government, and those agencies will be responsible for integrating it into the national reconstruction, transformation and development process. The said management will take into account the need to promote the constitution of various forms of public ownership.

2.5. Production and marketing.

(a) *Natural Resources:*

The State will control the exploration and development of natural resources, including mines, forests, fisheries and energy. Accordingly, it will manage those resources exclusively and directly or, failing that, will establish the rules and conditions to be applied when, for technological or funding reasons, coinvestment projects are necessary.

(b) *Basic production policy:*

The nation's resources will be directed mainly toward labor-intensive and intensive land-use activities. Efficiency will be striven for in the production of goods and services.

(c) *Priority given to agricultural output for domestic consumption:*

High priority will be given to agricultural production, chiefly for domestic consumption, with techniques that increase production without adverse effects on employment. Accordingly, the large tracts of arable land not currently under cultivation will be put to use through agrarian reform.

(d) *Agro-industrial development:*

Agro-industrial development, i.e., development of industries based on locally produced agricultural raw materials, will be promoted.

(e) *Marketing mechanisms:*

(i) Foreign trade: Marketing operations, such as the importation of basic inputs for agriculture, will be entrusted to the State.

This measure will be designed to obtain better markets and prices for such products; ensure adequate incomes and pay in the agricultural activities concerned; reduce production costs; and channel into the public sector a part of the foreign exchange earned by traditional exports.

(ii) Domestic trade: The State will strengthen or establish price regulation or control machinery and ensure supplies of the basic domestic consumer goods that make up the population's food needs, preventing speculation in such products.

(f) *Development of Nicaraguan enterprises:*

The State will give appropriate support and protection to the development of Nicaraguan enterprises, especially small and medium ones, vis-à-vis the transnationals. To that end it will apply a rational policy of incentives consistent with the plan for national reconstruction, transformation and development, and, by creating or strengthening pertinent institutions or mechanisms, further the identification, selection, promotion and funding of projects.

2.6. Foreign debt.

(a) *Restructuring and renegotiating the debt:*

The heavy foreign public debt contracted by the Somoza dictatorship, estimated at more than 13 billion cordobas (US$1.3 billion) will be restructured and renegotiated. The renegotiation of the foreign debt will include its reconversion under the terms, conditions and schedules most favorable to the national interest and will be closely tied to the country's economic recovery and the gradual restoration of its ability to pay. Special importance will be attached to the recommendations that UNCTAD has made in that regard.

(b) *Foreign financing:*

Foreign financing will be directed chiefly toward the country's most urgent and immediate reconstruction needs, such as activities speeding economic recovery in the short and medium term, in accordance with such priorities as may be established. Accordingly, attention will be given to the need to execute development programs of broad social scope, including projects capable of paying their own way. Attempts will be made to enlist international solidarity, mainly on the part of friendly nations. Soft or special terms will be sought for foreign financing of reconstruction. Public and private foreign indebtedness will be strictly controlled through the mechanisms deemed most appropriate.

(c) *Grants:*

The policy will be to accept international grants that are not subject to conditions or limitations prejudicial to national dignity or sovereignty. Resources thus obtained will be rigorously applied to the highest humanitarian and emergency priorities required for the country's reconstruction and development. The use and allocation of these funds will be dealt with in public government reports issued when necessary.

2.7. Tax and public spending policy.

(a) *Tax reform:*

The tax system will be reformed in order to obtain adequate revenues, ensure that the tax burden is fairly distributed, and end tax evasion and arbitrary tax collection. Among other measures, taxes on vital and mass-consumption articles will be abolished or reduced and luxury items will be taxed.

(b) *Elimination of smuggling:*

All types of smuggling and illicit traffic in goods will be eradicated. To that end, laws and other provisions establishing systems of privilege that encourage smuggling will be eliminated.

(c) *Control of tax exemptions:*

Strict control will be exercised over tax exemptions or reductions designed to stimulate production in certain sectors, in order to ensure that they are accomplishing the development purposes for which they were granted.

(d) *Public spending:*

Public spending will be managed within the most rigorous application of funds to development programs and projects, in accordance with priorities established in conjunction with the national plan and the budget. Its principal function will be to spur domestic income redistribution and maintain adequate levels of investment.

2.8. Reorganization of the financial system.

Substantial adjustments will be made to the organization and operation of the private financial system. The procedures for bringing them about will be as far-reaching as necessary to:

(a) meet the needs of the national interest and the common welfare;

(b) ensure adequate attraction and channelling of domestic funds in terms of the needs and priorities of the country's reconstruction, transformation and development;

(c) prevent concentration of economic power; and

(d) further the accomplishment of the social function which the financial system is called upon to perform in a country where acute social and economic underdevelopment prevails.

2.9. Foreign investment.

(a) *Orientation and basic provisions:*

Foreign investment will play a strictly complementary role to domestic efforts, to the development of which it must contribute. It must also contribute to the country's development and reconstruction, conform to domestic law, and leave national sovereignty intact. Foreign investment policy will therefore safeguard and protect the national interest. Special consideration will be given to areas of investment deemed to be of strategic importance for the country's development, such as natural resources exploration and development and (the strengthening of) the industrial, financial and transport sectors.

(b) *Approval of regulations and their content:*

The GRN will establish basic provisions and guidelines on the treatment of foreign capital, to cover such items as the acquisition of technology, industrial property and patent and trademark regulations.

(c) *Other fundamental guidelines:*

Foreign investment will be accepted only when the technological or financial needs for the project cannot be supplied by Nicaraguan nationals or by the State. In any case, steps will be taken to ensure that the technological knowledge gained from foreign investment will be transferred to Nicaraguan nationals and that such nationals will be afforded adequate participation in the ownership and management of the enterprises concerned.

Investments with negative effects on the country's ecology or its social and moral environment will not be permitted.

2.10. Agrarian reform.

(a) *General guidelines:*

An agrarian reform law and implementing legislation will be enacted to carry out, in accordance with clearly established guidelines, a process of transformation of agricultural ownership ensuring the rural population different forms of access to land and to technical assistance, as well as financing and other indispensable facilities.

Agrarian reform will be initiated with the appropriation by the State of the following properties:

(1) Land and farms taken from the Somoza family and their supporters, which will become part of the resources used for national reconstruction.

(2) Properties of debtors of State financial institutions who profited illegally from their ties with the Somoza régime.
(3) Properties of tax defrauders.
(4) National lands that were assigned by the régime for political purposes.
(5) Farmlands abandoned by the owners.
(6) Uncultivated lands, whether State-owned or part of large private holdings.

(b) *Forms of assignment:*

Upon being assigned to new owners, the lands concerned will be used for productive purposes, principally in associative ways that ensure the fulfillment of the social function of property.

(c) *Other agrarian guidelines:*

Income from land and the use of water will be regulated; also, the dividing up of even expropriated tracts of farmland will be avoided in order to prevent the creation of small holdings and to maintain adequate production levels.

2.11. Regional development.

A development policy will be pursued to meet the specific needs of different regions of the country.

2.12. Atlantic coast development.

The development of the country will extend to the people of the Atlantic coast. To that end coordinated joint action will be undertaken with appropriate State agencies for the purpose of establishing service facilities at strategic points in this region which, in conjunction with agrarian reform, will provide health, educational, technical assistance, financial and marketing services.

2.13. International economic relations.

(a) *International bodies and organizations:*

The country will participate actively in major international bodies and organizations; principally those addressing the socio-economic proposals and concerns of the developing countries, such as: the Conference of the Non-Aligned Countries, the Group of 77, the United Nations Conference on Trade and Development (UNCTAD), and other specialized agencies of the United Nations.

(b) *Technical and financial cooperation:*

Technical and financial cooperation from the international community must respond to the objectives and guidelines established by the GRN and will be mainly requested from the United Nations, friendly countries and those international organizations that fully respect the country's sovereignty and the firm decision of the government to uphold the principle of the self-determination of the Nicaraguan people. Necessary non-reimbursable financial and technical cooperation will be requested.

(c) *Latin American and Central American Integration and Cooperation:*

In the Latin American framework the action of SELA (Latin American Economic System) will be strengthened and emphasis will be placed on a multilateral approach when seeking joint solutions to common problems, especially those raised vis-à-vis the industrialized countries. Central American and Latin American integration will be supported in so far as it does not hinder the process of internal changes or the government's revitalization of the economy but promotes the legitimate interests and aspirations of peoples.

(d) *Property guaranties and activities of the private sector:*

Property and activities of the private sector not directly affected by the measures established or planned in this program will be fully guaranteed and respected.

III. Social domain

3.1. Objectives of social action.

All Nicaraguans will be given the real possibility to improve their living standards by the establishment of a policy to eliminate unemployment and provide access to housing, health care, social security, efficient mass transportation, education, culture, sports and wholesome entertainment.

3.2. Full employment and real wages.

(a) *Creation of sources of employment:*

In an effort to obtain maximum levels of employment, new sources of permanent jobs will be created.

(b) *Maintenance of real wages:*

A wage policy will be established for urban and rural areas and efforts will be made to ensure proper working conditions, treatment, number of workdays, housing, nutrition, etc., primarily in camps housing farm workers. In implementing that policy account will be taken of the importance of maintaining the peoples' purchasing power and providing just remuneration to cover their basic needs.

3.3. Labor and social security.

(a) *New labor code:*

A labor code will be promulgated which will truly protect laborers, farm workers and all types of wage earners. The legal rights of organized labor will be respected and the right to strike will be effectively guaranteed.

(b) *Restructuring of the social security system:*

The INSS (Nicaraguan Social Security Institute) will be restructured and made an efficient agency serving Nicaraguan workers. To that end true representatives of the trade-union sector will be included on the INSS board of directors. By gradually extending the benefits of the social security system to the worker's entire family and to every urban and rural area, the INSS will become a humane, competent, and efficient institution.

(c) *Other provisions affecting social security:*

Strict regulations will be established for the use of the financial resources of the Nicaraguan Social Security Institute in order to ensure their application to the specific purposes for which they were created. The various loans made by the Institute will be reviewed and adapted to the scope of coverage and financing.

3.4. Health and nutrition.

(a) *Health care planning:*

A Unified National Health System will be established which will gradually include the active participation of the community in order to lay the bases for the delivery of these services in a manner than ensures their effectiveness in terms of quality and timeliness. The bases for the operation of this system will be included in the Health Plan.

(b) *Personnel training:*

In order to have trained human resources available for the implementation of programs and projects of the Unified National Health System, an active policy will be carried out to train technicians at the various levels required, including the training of paramedical and auxiliary staff.

(c) *Regulations applicable to medicines:*

The domestic prices of medicines and their indiscriminate importation will be regulated. The system of trade marks for the production of medicines will be revised to make them accessible to the poor and the sale of medicines will be appropriately supervised.

(d) *Participation of health care experts:*

In view of the important social function of health care experts, the State will establish mechanisms to promote their organized participation in the formulation and implementation of the National Health Plan.

(e) *Children's nutrition program:*

A children's nutrition program will be initiated, using, among other facilities, schools, health units and day care centers.

(f) *Eradication of chronic malnutrition:*

The chronic malnutrition that affects a large percentage of the population, especially in rural areas, will be eradicated. To that end, in addition to ensuring an adequate food supply, educational programs will be carried out to improve the nutritional diet of the lowest income groups.

3.5. Education.

(a) *Educational reform:*

An in-depth reform of the objectives and content of national education will be carried out in order to make education a key factor of the process of the humanitarian transformation of Nicaraguan society and to give that process a critical and liberating approach. This reform will be comprehensive and will include all stages of the process, from preschool to higher education.

To that end, a national plan for the comprehensive development of education will be drafted and a general law on education issued.

(b) *Free and compulsory education:*

Primary and secondary education will be free and compulsory and, in addition to giving the student scientific training, will prepare him to perform skilled work and understand the problems of Nicaragua.

(c) *Control of the prices of textbooks and school supplies; school uniforms:*

As a first step, the prices of textbooks and school supplies will be strictly controlled. As soon as possible, the Ministry of Public Education will establish the mechanisms required for the production and sale of textbooks and school supplies so that they may be provided free of charge to the students enrolled in public schools.

A single school uniform will be established for all students.

(d) *Regulation of private schools:*

The Ministry of Public Education will issue regulations for the operation of private schools, regulating registration and tuition fees and ensuring strict compatibility with national educational plans. Similarly, appropriate control will be exercised over the physical facilities of such institutions (libraries, laboratories, gymnasiums, etc.) in order to coordinate them with the services provided in public schools. Communities will be urged to participate in efforts to improve education.

(e) *Establishment of vocational schools:*

Vocational schools will be established to train the labor force in occupations pertinent to national development.

(f) *Establishment of rural educational centers:*

In accordance with the policies and priorities of programs of instruction, funds will be channelled to establish rural educational centers in which, in addition to a basic and comprehensive education, technical training will also be given to the rural population. Curricula for rural education will be fully coordinated with the processes of agrarian reform and rural development.

(g) *Respect for the autonomy of the National University:*

The autonomy of the National Autonomous University of Nicaragua (UNAN) will be maintained, and it will be afforded full support so that it may develop creative instruction and conduct appropriate research in the sciences and in the study of national problems. A National Council of Higher Education will be established to coordinate professional education.

(h) *Eradication of illiteracy:*

A national campaign mobilizing all the country's resources will be undertaken in order to bring about the total eradication of illiteracy. At the same time, emancipatory adult education programs will be set up in order that adults may be fully integrated in the national reconstruction and development process.

3.6. Housing.

(a) *Urban reform:*

A true reform will be carried out in order to resolve, *inter alia*, the problems of the slum neighborhoods, the squatters' settlements, unsanitary conditions and limits to be imposed on ownership of urban property. To avoid speculation, high priority will be given to residential rent control.

(b) *Planning:*

A national housing plan will be drawn up and carried out in order to meet the basic needs of the people, especially the lowest income segment. The housing programs shall provide for the construction of units of adequate size, at reasonable cost, and offering necessary sanitary installations. Prices of building materials will also be controlled.

(c) *Rural housing program:*

A program of rural housing will be undertaken with a view to furnishing the rural population with housing in accordance with its needs.

(d) *Emergency program for slum neighborhoods:*

In the slum areas, an emergency program will be carried out to rebuild the homes of victims of the genocidal bombings of the Somoza dictatorship as well as to improve existing housing. This program will be implemented by means of a long-term low-interest financing system and by using the infrastructure already in place in those heroic neighborhoods.

3.7. Public services and utilities — transport, water, light, sewerage.

(a) *Organization of mass transit:*

The State will make the municipality of Managua owner and manager of the metropolitan mass transit system. At the same time, the necessary measures will be taken to reorganize and regulate urban and intercity mass transit lines in order to promote efficiency and the best possible service to the user.

(b) *Regulation of fares:*

All mass transit fares will be regulated, both to permanently ensure fare levels within reach of the masses and to maintain adequate levels of efficiency.

(c) *Traffic courts:*

Traffic courts will be established under the jurisdiction of the judiciary. They will be strictly civil in nature.

(d) *International action on maritime freight rates:*

The unjustified increases in maritime freight rates imposed unilaterally by the international maritime conferences will be combated by means of joint international efforts, as required, to be carried out in particular in coordination with the countries of the Central American and Caribbean area as well as with the rest of Latin America.

(e) *Extension of water, light, and sewerage services:*

Public utilities will be expanded, particularly those of water, light and sewerage, in accordance with the reconstruction, transformation and development plan.

(f) *Revision and modification of utility rates:*

Public utility (water, light and sewerage) rates will be revised and modified, eliminating the subsidy by consumers to industry and providing special benefit to the masses.

3.8. Welfare of women, children and the elderly.

(a) *Status of women:*

The status of women will be assured, all the rights of women in society enforced, and discrimination eliminated. In the health plans, pregnant women and nursing mothers will receive priority attention.

(b) *Establishment of day-care centers:*

Day-care centers will be set up with the actual participation of the mothers themselves, in order to facilitate the integration of women in the national reconstruction and development process.

(c) *Comprehensive child care:*

Children will be given comprehensive care, beginning with pre-natal care, followed by care during their entire growth and development. Special attention will be given to combating infectious and contagious diseases.

(d) *Elimination of child labor, neglect and mendicancy:*

As a result of the early implementation of the measures indicated in the fields of health and education, together with other complementary measures, child labor as well as mendicancy and child neglect will be eradicated.

(e) *Care of the elderly:*

In a broad humanitarian spirit and within a framework of respect for the human person, the most pressing needs of elderly citizens will be met, in particular those who are unable to work, are homeless, mendicants, or suffering from illnesses requiring medical treatment. For these purposes, the necessary facilities or installations such as boarding houses or homes for the aged, will be established or reorganized.

3.9. Culture and sports.

(a) *Incentives to creativity and artistic expression:*

Literary, artistic, artisanal and folkloric production in all its expressions will be encouraged with a view to consolidating an authentic Nicaraguan popular culture, and efforts will be made to recover national cultural values.

(b) *Training centers:*

Schools will be established to provide training in music, the dance, the plastic arts and the theatre; creation of groups in the aforementioned disciplines will be encouraged throughout the country.

(c) *Popular editions:*

Large-scale printings will be undertaken of books for mass consumption which will serve to keep the process of cultural formation alive following completion of the national literacy campaign.

(d) *Protection of the artistic and cultural heritage:*

The artistic, cultural, and historical heritage of the nation will be zealously protected, for which purpose libraries, museums and archives will be established; likewise, laws will be passed to prevent the national cultural heritage from being removed from the country.

(e) *Knowledge and dissemination of the values which form nationality:*

Institutions will be established to study, analyse and disseminate national values, especially the life and works of Augusto Cesar Sandino.

(f) *Incentives for sports:*

The practice of sports by young people will be encouraged by all possible means, as a part of the integral process of education. Stadiums, playing fields and parks will be built throughout the country.

3.10. Reconstruction of Managua and other cities destroyed by the dictatorship.

(a) *Reconstruction of Managua:*

A true plan for reconstruction of the capital city will be undertaken and will be based on humanitarian criteria; the personal interests which were the basis of the decisions adopted by the dictatorship will be replaced by the interests of the people.

(b) *Reconstruction of other cities:*

Urgent measures will be taken to rebuild the cities and towns destroyed by the Somoza régime, and to meet their basic infrastructural needs. In particular, attention will be given to meeting the needs of the families affected by the war as well as those in distress, refugees and emigrés.

IV. Institutional reorganization

An administrative reform, principally of the executive branch, will be carried out in order to: *(a)* rationalize its functions and eliminate excessive bureaucracy and overlapping in governmental activities; and *(b)* establish and put to use a system of economic and social planning to ensure implementation of plans and projects of economic and social development in accordance with established priorities.

Annex 68

"ESTATUTO FUNDAMENTAL" ("BASIC STATUTE"), GOVERNMENT OF NATIONAL RECONSTRUCTION OF THE REPUBLIC OF NICARAGUA, *LA GACETA*, 22 AUGUST 1979 (ENGLISH TRANSLATION PROVIDED)

[Spanish text not reproduced]

Considering:

I

That it is necessary to subject the Government to a set of rules that will guarantee the rights of the citizens and regulate the public service;

That the primary functions of the Government of National Reconstruction will be to restore peace, lay the foundations for the establishment of a democratic system of government that is deeply rooted in the people, and begin the great task of national political, social and economic reconstruction, for which an appropriate legal system is required,

Therefore:

Decrees:

The following Basic Statute of the Republic of Nicaragua.

TITLE I. GENERAL PROVISIONS

Chapter I. Immediate Objectives

Article 1. The immediate objective and principal task of the Government of the Republic shall be to implement its program of government published on July 9, 1979.

Article 2. To implement and carry out the Program of Government, the Government of National Reconstruction shall establish the necessary priorities; it is hereby empowered to make such adjustments as political, social and economic conditions may require.

Chapter II. Rescisions

Article 3. The present Political Constitution and Constitutional Laws are hereby repealed.

Article 4. The Chambers of Deputies and Senators, the Supreme Court of Justice, the Courts of Appeals, the Superior Labor Court, and other structures of Somocist power are declared dissolved.

Article 5. Provisions referring to the minority party in any law in force are declared especially inapplicable.

TITLE II. RIGHTS AND GUARANTIES

Sole Chapter. Basic Principles

Article 6. The rights enunciated in the United Nations Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, and International Covenant on Legal and Political Rights and in the Declaration on the Rights and Duties of Man of the Organization of American States are fully guaranteed in the manner set forth in the Statute on the Rights and Guaranties of the Nicaraguan People to be promulgated concurrently with this Statute.

Article 7. The unconditional equality of all Nicaraguans shall be established.

Article 8. The freedom of conscience and religion, based on a broad spirit of tolerance, and the unrestricted freedom of oral and written expression of thought and to form political and labor organizations, subject only to such limitations as may derive from the Statute on the Rights and Guaranties of the Nicaraguan People, are hereby recognized.

TITLE III. ORGANIZATION OF THE STATE

Chapter I. Branches

Article 9. The Branches of the State shall be: The Governing Junta, the Council of State and the Courts of Justice.

Chapter II. The Governing Junta

Article 10. Until such time as the new Political Constitution of the Republic is adopted the Executive Power shall be vested in the Governing Junta, which shall share the Legislative Power with the Council of State in conformity with the provisions set forth hereinbelow.

Article 11. The Governing Junta shall be composed of the five persons decreeing this Basic Statute, who have been appointed by the revolutionary movement from among the various political, social and economic sectors of Nicaragua.

Article 12. The Governing Junta may assign its members specific public administration responsibilities. The Governing Junta shall appoint a Secretary who shall have the rank of Minister of State. The executive and administrative functions shall be carried out by means of decrees, orders and official communications.

Article 13. The Governing Junta's Legislative Power shall be exercised by means of laws enacted in the manner stipulated in each case or in the manner generally agreed upon.

Article 14. Laws issued by the Governing Junta shall be submitted to the Council of State, which may veto them within a five-day period by a majority of two-thirds of its members. Failure to veto a law during the period stipulated shall be understood as tacit approval.

Article 15. The decisions of the Governing Junta shall be adopted by majority vote. Quorum shall be constituted by a majority of the members.

Chapter III. The Council of State

Article 16. The Council of State shall be composed of 33 members appointed by the following political, social, economic and labor organizations:

1. Frente Sandinista de Liberación Nacional (FSLN) (Sandinista National Liberation Front): six members.
2. Frente Patriótico Nacional (National Patriotic Front):
   Movimiento Pueblo Unido (United People's Movement): six members
   Partido Liberal Independiente (Independent Liberal Party): one member
   Agrupación de los Doce (Group of the Twelve): one member
   Partido Popular Social Cristiano (Christian Socialist Popular Party): one member
   Central de Trabajadores de Nicaragua (CTN) (Central Organization of Workers of Nicaragua): one member
   Frente Obrero (Workers Front): one member
   Sindicato de Radioperiodistas (Radio Journalists' Union): one member.
3. Frente Amplio Opositor (FAO) (Broad Opposition Front):
   Partido Conservador Democrático (Conservative Democratic Party): one member
   Partido Social Cristiano Nicaragüense (Nicaraguan Christian Socialist Party): one member
   Movimiento Democrático Nicaragüense (Nicaraguan Democratic Movement): one member
   Movimiento Liberal Constitucionalista (Liberal Constitutionalist Movement): one member
   Partido Socialista Nicaragüense (Nicaraguan Socialist Party): one member
   Confederación General del Trabajo Independiente (Independent General Confederation of Labor): one member
   Confederación de Unificación Sindical (CFU) (Labor Unification Confederation): one member.
4. Consejo Superior de la Empresa Privada (COSEP) (Superior Council of Private Enterprise):
   Instituto Nicaragüense de Desarrollo (INDE) (Nicaraguan Development Institute): one member
   Cámara de Industrias de Nicaragua (CADIN) (Nicaraguan Chamber of Industries): one member
   Confederación de Cámaras de Comercio de Nicaragua (Confederation of Chambers of Commerce of Nicaragua): one member
   Cámara Nicaragüense de la Construcción (Nicaraguan Construction Chamber): one member
   Unión de Productores Agropecuarios de Nicaragua (UPANIC) (Union of Agricultural Producers of Nicaragua): one member
   Confederación de Asociaciones Profesionales de Nicaragua (CONAPRO) (Confederation of Professional Associations of Nicaragua): one member.
5. Universidad Nacional Autónoma de Nicaragua (UNAN) (National Autonomous University of Nicaragua): one member.
6. Asociación Nacional del Clero (National Clergymen's Association): one member.

An alternate member shall be appointed for each member of the Council of State.

Article 17. The Council of State may, by majority vote, submit proposed laws to the Governing Junta. Laws issued by the Governing Junta on the recommendation of the Council of State shall not be subject to the procedure set forth in Article 14 of this law. When the Governing Junta amends proposed laws submitted to it by the Council of State, the amendment or amendments shall be subject to the procedure set forth in Article 14 for purposes of immediate veto or approval.

Article 18. It shall be the responsibility of the Council of State to prepare a draft electoral law and a preliminary draft for a Political Constitution.

Article 19. The Council of State shall be governed by internal rules adopted by the Council itself.

Chapter IV. Common Provision

Article 20. In performing their duties, the members of the Governing Junta and the Council of State shall enjoy full freedom of conscience and shall remain loyal to the interests of the Nation.

Chapter V. The Courts of Justice

Article 21. The Judicial Power shall be vested in a Supreme Court of Justice, the Courts of Appeals and the Superior Labor Court, whose justices shall be appointed by the Governing Junta, and the District and Local Judges and other officials, who shall be appointed by the Supreme Court of Justice.

Article 22. The organization and functions of the Courts and the Judges shall be in conformity with existing legislation, provided that such legislation is not in conflict with or is not expressly or tacitly amended by this Basic Statute or by other laws or decrees of the Government of National Reconstruction.

TITLE IV.

Sole Chapter. The Armed Forces

Article 23. Nicaragua's National Guard, the Office of National Security and the Military Intelligence Service are hereby declared dissolved and all the laws, regulations and orders under which they operate are therefore repealed.

Article 24. Nicaragua's National Guard shall be replaced by a new patriotic National Army devoted to the protection of the Democratic process, the Sovereignty and Independence of the Nation, and the integrity of its territory. The National Army shall be composed of the combatants of the Frente Sandinista de Liberación Nacional (Sandinista National Liberation Front), the officers and men of the Nicaraguan National Guard who demonstrated their honorable and patriotic conduct in the corruption, repression and defeatism that prevailed during the Dictatorship and the men who joined the struggle to overthrow the Somocist régime, the men who fought for freedom and may wish to join the Army, and any able citizens who may be doing their compulsory military service in due course. There will not be room in the new National Army for corrupt military men who are guilty of crimes against the people.

Article 25. Members of the National Army may not participate in electoral campaign activities, but they may exercise their political rights as citizens.

Article 26. The National Army commands shall be staffed temporarily by the military commanders and leaders of the armed movement that ended the dictatorship and the National Guard officers who joined the fight. The organization and structure of the National Army shall be regulated by the Government of National Reconstruction, which shall issue its laws and regulations.

Article 27. The National Police shall be governed by a special set of rules that shall take into account the nature of its civic functions and of its responsibility for protecting the citizenry. Pending enactment of the necessary legislation the National Army shall assume temporary responsibility for providing police services throughout the country.

TITLE V.

Sole Chapter. Election Matters

Article 28. As soon as National reconstruction permits general elections shall be held for the purpose of appointing a National Assembly. The elections shall be called by the Governing Junta in conformity with the new Electoral Law which shall be enacted in due course.

TITLE VI. AMENDMENTS AND DURATION

Chapter I. Amendments

Article 29. This Basic Statute may be amended in whole or in part by the National Reconstruction Government in conformity with Articles 15 and 17 hereunder. Amendments shall become effective immediately upon promulgation.

Chapter II. Duration

Article 30. This Law shall enter into force when published by decree anywhere in the national territory or broadcast by radio or television. It shall remain in force until it is superseded by a new Political Constitution adopted by the National Assembly, as referred to in Article 28 hereunder.

TITLE VII.

Sole Chapter. Transitory Provisions

Article 31. Pending the formation and installation of the Council of State, laws issued by the Governing Junta shall not be subject to the procedures set forth in Article 14 hereunder.

Done at Managua on July 20, 1979, Year of the Liberation.

Junta of the Government of National Reconstruction of the Republic of Nicaragua. Violeta Barrios Chamorro, Sergio Ramírez Mercado, Alfonso Robelo Callejas, Daniel Ortega Saavedra, Moisés Hassan Morales.

Annex 69

"ESTATUTO SOBRE DERECHOS Y GARANTIAS DE LOS NICARAGÜENSES" ("LAW ON RIGHTS AND GUARANTEES OF NICARAGUANS"), *LA GACETA*, 17 SEPTEMBER 1979 (ENGLISH TRANSLATION PROVIDED)

[Spanish text not reproduced]

DECREE NO. 52

THE JUNTA OF THE GOVERNMENT OF NATIONAL RECONSTRUCTION OF THE REPUBLIC OF NICARAGUA

Considering

I

That the systematic disregard by the Somocist dictatorship of the fundamental rights of the Nicaraguan people and of the human being made possible acts of barbarity insulting to the conscience of humankind; and

II

That freedom, justice and peace are based upon the recognition and affirmation of the fundamental rights of the human being and the community, for which reason it is essential that these rights be protected by the revolutionary government;

Therefore

Making use of their Faculties

decrees the following:

STATUTE ON THE RIGHTS AND GUARANTEES OF THE NICARAGUAN PEOPLE

Title I. Rights of the People

Article 1. The Nicaraguan people have the right to free and full self-determination to establish their political condition and likewise provide for their economic, social and cultural development.

The State shall guarantee by law the direct participation of the people in the fundamental affairs of the nation, both at the national as well as at the local level.

Article 2. For the achievement of their goals, the Nicaraguan people have the right to freely dispose of their wealth and natural resources, without detriment to obligations derived from international cooperation, based on the principle of reciprocal benefit, solidarity and international law. Under no circumstances shall the Nicaraguan people be deprived of their own means of subsistence.

Title II. Individual, Civil and Political Rights

Article 3. All persons are equal before the law and are entitled to equal protection. There shall be no discrimination for reasons of birth, race, color, sex, language, religion, opinions, origin, economic status or any other social condition.

It is the duty of the State to remove, by any means at its disposal, any obstacles which impede the equality of the citizens and their participation in the country's political, economic and social life.

Article 4. The State shall respect and shall guarantee for all persons found within its territory and subject to its jurisdiction the rights recognized in this Title. Foreigners shall not be allowed to intervene in the country's political affairs.

Article 5. The right to life is inviolable and inherent to the human being. In Nicaragua there is no death penalty.

Article 6. Everyone has the right to have his physical, mental and moral integrity respected. Punishment shall not be extended to any person other than the criminal.

No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. No sentence or sentences, either separately or together, shall exceed a period of thirty years.

Article 7. No one shall be subject to slavery. Slavery and slave trade shall be prohibited in all their forms. No one shall be subject to involuntary servitude or be required to perform forced or compulsory labor. The law shall regulate the compulsory labor and services required in virtue of a judicial decision, of conditional freedom, for military service or social or civil service, for service exacted in time of danger or calamity that threatens the existence or well-being of the community, and the work or service that forms part of normal civic obligations.

Article 8. Every individual has the right to individual liberty and personal security. No one shall be subject to arbitrary arrest or imprisonment, nor be deprived of his liberty, except for reasons established by law and according to legal procedure.

Consequently:

1. Detention may only occur when there is a written order from a competent judge or from those authorities explicitly authorized by the law, except in the case of a flagrant crime.
2. Any person detained shall have the right:

(a) to be informed and notified, without delay, of the reason for his detention and of the accusation, denouncement or charge against him;
(b) to be brought, within a period of 24 hours, before a competent authority, or be released;
(c) to present a petition for personal exhibition;
(d) to be treated with respect for the inherent dignity of the human person;
(e) to receive indemnity in case of illegal detention or imprisonment.

Article 9. Accused persons shall be segregated from convicted persons and women from men, and receive treatment appropriate to their status. Minors shall only be brought before juvenile courts and, under no circumstances, shall they be sent to common prisons. Rehabilitation centers shall exist for them under the tutelage of the Ministry of Social Welfare.

Article 10. The essential aim of the penitentiary system shall be to reform and socially rehabilitate the convict, and it shall attempt to incorporate him into the productive process.

Article 11. Every person accused of a crime has the right, with full equality, to the following minimum guarantees:

- *(a)* to be presumed innocent so long as his guilt has not been proven according to the law;
- *(b)* to be informed without delay, in a language he can understand, and in detail, of the nature of and reasons for the accusations formulated against him;
- *(c)* to be judged without delay by a competent court. Criminal proceedings should be public, except in some special cases when the press and general public may be excluded from all or part of the trial for reasons of morality, public order or national security;
- *(d)* that his participation be guaranteed from the initiation of the proceedings;
- *(e)* that he be permitted real and effective participation in the proceedings and adequate time and means for his defense. When the prisoner does not designate his council at the opening of the trial and is not himself a lawyer, a public defender shall immediately be named to represent him;
- *(f)* in case he cannot be found, previous to summons by edict, a public defender will be named to defend him;
- *(g)* to be assisted, without charge, by an interpreter if he does not understand or speak the language used by the court;
- *(h)* to participate in the contribution and cross-examination of any type of evidence before the final sentence;
- *(i)* not to be compelled to be a witness against himself or to plead guilty;
- *(j)* not to be sentenced to prison without all the evidence required by law having been gathered and that this sentence be dictated within the 10-day period following the order for his arrest;
- *(k)* that any person guilty of a criminal offense shall be entitled to appeal the judgment and the sentence imposed to a higher court, according to the law;
- *(l)* not to be prosecuted for a criminal offense for which he has been convicted or acquitted by a nonappealable judgment;
- *(m)* not to be withdrawn from his competent judge.

Article 12. No one shall be convicted for acts or omissions that, at the time they were committed, did not constitute criminal offenses according to national or international law. Neither shall a heavier penalty be imposed than the one applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter sentence, the guilty person shall benefit therefrom.

Nothing provided for in this article shall be in opposition to the judgment and sentence of a person for acts or omissions that, at the time they were committed, constituted criminal offenses according to the general principles of the law recognized by the international community.

Article 13. Trial by jury is established for those criminal offenses determined by law.

Article 14. No one shall be imprisoned solely because he is unable to fulfill a financial obligation, whatever its origin.

Article 15. Every person who is lawfully within Nicaraguan territory shall have the right to freely move about and freely choose his place of residence. Nicaraguans shall be entitled to freely enter and leave the country.

Article 16. Anyone persecuted for fighting for the cause of peace and justice, and for the recognition or expansion of human, civil, political, social, economic and cultural rights of individuals or groups is guaranteed the right to asylum in Nicaragua. If, for any reason, a person with asylum should be deported, he shall never be returned to the country where he is persecuted.

Extradition shall be regulated by law and international agreements and shall never be carried out for political crimes or common crimes related thereto, according to Nicaraguan judgment. For purposes of extradition, genocide shall not be considered a political crime.

Article 17. In Nicaragua, every human being is entitled to the recognition of his juridical personality and capacity. Consequently, personal or patrimonial limitations may only be imposed when based on the law, except for those obligations imposed by human solidarity on conduct and abstinence, the duty to behave fraternally, respect for the rights and freedoms of others, and the need to meet the just requirements of morality, public order and the general welfare in a democratic society, even when these duties are not explicitly established by law.

Article 18. No person shall be the object of arbitrary or unlawful interference in his private life, his family, his home, his correspondence or his communications; nor of attacks on his honor and reputation, and shall be entitled to the protection of the law against such interferences or attacks.

Especially:

1. Every person's home and any other private enclosures are inviolable, and may only be entered with a written order from the competent judge, either to impede the commitment of a crime or its impunity, or to avoid harm to persons or their property, subject to the law.

2. Private documents and communications are inviolable. The law shall establish the cases and procedures for the examination or sequestration of private documents, accounting books and their annexes, when it is indispensable in order to clarify matters under investigation by the courts or for fiscal reasons.

Article 19. No one shall be subject to coercive measures that might impair his freedom of thought, conscience and religion, nor his right to hold or adopt the religion or beliefs of his choice, and freedom to manifest them individually or collectively, in public or in private, by means of worship, celebration of rites, practices and teaching.

Article 20. Freedom of information is one of the fundamental principles of authentic democracy. Therefore, it cannot be subjugated, either directly or indirectly, to the economic power of any group.

Article 21. Everyone has the right to freedom of expression. This right includes freedom to seek, receive and impart information and ideas, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. The exercise of these freedoms entails obligations and responsibilities and, consequently, can be subject to certain formalities, conditions and restrictions established by law, and which are necessary:

(a) in the interest of national security and integrity, public safety and the national economy;
(b) the defense of order and crime prevention;
(c) the protection of health and morality, the dignity of persons and the reputation or the rights of others;
(d) to impede the spread of confidential information or to guarantee the authority and the impartiality of the judicial branch.

Article 22. Any propaganda against peace and any advocacy of national, racial or religious hatred is prohibited.

Article 23. The right of peaceful assembly is recognized. The right to public demonstration shall be regulated by police laws.

Article 24. Everyone has the right to associate freely with others for licit ends.

Article 25. All citizens shall enjoy, without restrictions, the following rights:

(a) to organize political parties or groups, or belong to them;
(b) to take part in the conduct of public affairs, either directly or through freely elected representatives;
(c) to present petitions, in writing, both individual and collective, to any public functionary, official entity or public power, and the right to obtain its prompt resolution;
(d) to vote and to be elected and to have access, under general conditions of equality, to the public service.

Article 26. Every person has the right to a nationality. No one shall be arbitrarily deprived of his nationality or of the right to change it.

Article 27. Property, whether it be individually or collectively owned, has a social function, in virtue of which it can have limitations placed upon it, as far as its title, benefit, use and availability, whether it be for reasons of security, public interest or utility, social interest, national economy, national emergency or calamity, or when it is for land reform purposes.

Title III. Individual, Economic, Social and Cultural Rights

Chapter I. Economic Rights

Article 28. Taking duly into account rights and the national economy, the law shall determine to what extent the economic rights recognized in the present Statute are to be guaranteed for those persons who are not Nicaraguans.

Article 29. Work is a right and a social responsibility of the individual person. It is the State's duty to procure full and productive employment of all Nicaraguans under conditions which guarantee the fundamental rights of the human being.

Article 30. Everyone has the right to enjoy just and favorable conditions of work which assure him, especially:

1. A remuneration which provides workers with, as a minimum:

(a) an equal salary or wage for equal work, under identical conditions of efficiency and appropriate to its social responsibility, without discrimination based on sex;
(b) dignified living conditions for the worker as well as his family.

2. Safe and hygienic working conditions.

3. Equal opportunity for all to be promoted to the superior level they merit, the only limitation being time in service and ability.

4. Rest, the enjoyment of leisure time, a reasonable limitation of working hours and periodic vacations with pay and really without working, as well as remuneration for holidays.

Nothing provided for in this article gives the employer the authority to deny workers rights or guarantees which they have previously obtained, under the pretext that they are not mentioned in this article or that they are mentioned in a lesser degree or regulation.

Chapter II. Social Rights

Article 31. In order to promote and protect the economic and social interests of the Nicaraguan people, the following is guaranteed:

1. The right to found and promote popular, community, neighborhood and rural organizations, etc.; and professional and trade-union associations.
2. The right of trade unions to form federations or national confederations and of these to found or become members of international trade union organizations.
3. The right to found and promote work and production cooperatives.

Article 32. All workers have the right to strike, exercised in conformity with the law.

Article 33. Everyone has the right to social security; to the realization of the rights indispensable for his dignity and the full development of his personality; to a standard of living which assures the health and well-being of himself and his family, and especially, food, clothing, housing, medical care and necessary social services; and the right to social security in the event of unemployment, sickness, motherhood, disability, widowhood, old age, death, orphanage, professional risks or other cases of loss of means of livelihood.

Article 34. The family is the natural group unit of society and is entitled to protection by society and State.

Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names, if necessary.

Marriage is based upon the voluntary consent of the man and the woman. Absolute equality of rights and responsibilities shall exist for both man and woman in the family relationship.

In case of dissolution of the marriage, the necessary protection of the children shall be assured.

Parents have the obligation to concern themselves with the education of their children, prepare them for socially useful work, and raise them as worthy members of society. Children are obliged to concern themselves with their parents and assist them.

Article 35. Every minor child has the right, without discrimination, to the measures of protection required by his condition as a minor, on the part of his family, society and the State.

Parents have the same obligations towards children born out of wedlock as towards those born in wedlock. Any personal qualification regarding the nature of the filiation is forbidden. The right to investigate paternity is established.

Article 36. The State shall adopt special measures to protect and assist minor children and adolescents, without discrimination for reasons of filiation or any other condition. Children and adolescents shall be protected against any form of economic or social exploitation. It is forbidden to employ minor children and adolescents for work harmful for their health and morality, or where their life might be in danger, or where their normal development or their obligatory education might be affected.

Article 37. The State shall provide special protection for mothers during a reasonable period of time before and after childbirth. During this period the mothers who work must be given leave with pay and the appropriate social security benefits.

The working mother shall be entitled to have the State watch over her minor children while she works.

Article 38. The State recognizes the fundamental right of the Nicaraguan people to be protected against hunger and shall advocate the following program:

1. Infantile nutrition.

2. The eradication of chronic malnutrition by ensuring adequate availability and an equitable distribution of food.

3. Alimentary education aimed at improving diet through the imparting of principle of nutrition.

Article 39. The Nicaraguan people are entitled to enjoy the highest level of mental and physical health. The State is obliged to adopt measures to achieve:

1. The reduction of the mortality rate and of infant mortality, and the healthy development of children.

2. The improvement, in all its aspects, of hygienic work conditions and the environment.

3. The prevention and treatment of epidemic, endemic and professional diseases or of any other type and their eradication.

4. The creation of conditions which would insure medical assistance for all and medical services in case of illness.

5. An intensive and systematic practice of sports through the creation of all types of facilities.

Chapter III. Cultural Rights

Article 40. 1. Everyone has a right to education.

2. Elementary and secondary education shall be free, compulsory and accessible to all. A basic education should be promoted for those persons who have not received or finished their elementary education. Secondary education shall include technical and professional education in order to prepare everyone for qualified work and an understanding of the Nicaraguan reality. A close relationship shall exist between education and work.

Higher education should be equally accessible to all, on the basis of individual capability, by any appropriate means, and in particular, by the progressive implantation of free education.

3. Literacy is declared of social interest and is the responsibility of all Nicaraguans.

4. The freedom of parents to choose for their children schools or academies other than those created by the State shall be respected, provided that those schools fulfill the minimum requirements prescribed or approved by the State, regarding educational material and that they strictly adhere to the national plans for education.

The right of individuals and entities to establish and direct educational institutions shall be respected, with the condition that they fulfill the requirements mentioned in the preceding paragraph.

The State shall supervise all of the country's educational centers. The supervision shall be constant in order to insure the carrying out of its educational policy and the national study plans and programs.

5. The State shall approve the fees charged by private centers. In no case shall educational centers be aimed at profit-making.

6. It is the duty of the State to guarantee, for all those children who might need them, food in the schools, clothing, shoes, school books and supplies.

Article 41. Freedom to lecture and research are guaranteed as essential principles of education at all levels.

The teaching, administrative and economic autonomy of the Universidad Nacional Autónoma de Nicaragua (UNAN) is guaranteed, so that it might respond to what is in the interest of the transformation of the nation, within national development planning. The State shall provide the necessary economic support so that it might develop a creative education and a scientific investigation in accordance with the national reality.

Article 42. A National Council for Post-Secondary Education shall exist to coordinate higher education throughout the nation. It shall be composed of all the institutions at that level, and presided over by the Minister of Education.

Article 43. The Universidad Nacional Autónoma de Nicaragua shall be the only one authorized by the State to decide upon the recognition of diplomas and titles of higher education issued by foreign institutions. The law shall establish the requirements for the professional incorporation of natives and foreigners who have graduated abroad, based on reciprocity, and in accordance with international agreements on the subject.

Article 44. The State shall be exclusively in charge of the formation of teachers for pre-school and elementary education. The formation of the professorate for secondary education shall also be a primordial task of the State.

Article 45. Everyone has the right to participate in the cultural life and to enjoy the benefits of scientific advancements and their applications. The State shall respect the freedom indispensable for scientific investigation and creative activity, guaranteeing those persons the protection of the moral and material interests resulting from any scientific, literary or artistic production of which they are the authors.

Article 46. The State shall be obliged to adopt those measures necessary for the conservation, development and diffusion of science and culture, which should be aimed at the full development of the human personality and of the meaning of his dignity, the strengthening of respect for Human Rights, and the transformation of Nicaraguan society.

The historical, cultural and artistic patrimony of the nation shall be protected by the State by means of the necessary laws.

Title IV. Final Provisions

Article 47. No provision of this Statute shall be interpreted as conceding any right to the State, a group or individual, to undertake and develop activities or carry out illicit acts intended to suppress any whatsoever of the rights and freedoms recognized herein, or to limit it to any extent beyond that foreseen herein.

Legal measures intended to sanction crimes committed and the recovery of wealth either usurped or illicitly acquired during the dictatorial Somocist régime or under its protection are excluded.

Article 48. The exercise of each person's rights and freedoms is inseparable from the fulfillment of his obligation to the community.

Article 49. Under exceptional or emergency circumstances which put in danger the life or stability of the nation, such as civil or international war, or the danger that they might occur; because of public disasters or wars suffered and for motives of public order and State security, the Junta of the Government of National Reconstruction shall adopt provisions which suspend in part or throughout all the national territory, the rights and guarantees set forth in the present Statute. The suspension may be ordered for a limited time and be extendable according to the circumstances ruling in the country.

What is provided for in this article in no way authorizes the suspension of the rights and guarantees set forth in the following articles: 5, 6 and 7 in what refers to slavery and involuntary servitude; 12, paragraph 1; 19; 25, clauses *(b)*, *(c)* and *(d)*; 26; 34 and 35.

Article 50. Any person whose rights and freedoms recognized in this Statute or in the Fundamental Statute promulgated on July 20, 1979, might have been violated may present a recourse for protection in conformity with the law.

Title V. Transitory Provisions

Article 51. For a period of 60 days from this date, the exercise of the rights and guarantees set forth in this Statute are suspended for those persons under investigation for criminal offenses included in the penal code and in international covenants, committed during the Somoza régime.

Such a suspension does not affect the rights and guarantees indicated in Article 49 of this Statute.

Article 52. This Statute shall become effective as of this date, from the moment of its diffusion by any mass media of communication, without hampering its later publication in the official *Gazette*.

Decreed in the city of Managua, on the twenty-first day of the month of August, nineteen hundred and seventy-nine, Year of National Liberation.

Violeta B. Chamorro
Alfonso Robelo Callejas
Sergio Ramírez Mercado
Moisés Hassan Morales
Daniel Ortega Saavedra.

Articles 7, 11, 34 and 49 were reformed by Decree No. 1025, dated April 21, 1982, published in the *Gaceta No. 99* on April 28, 1982.

Annex 70

"LEY QUE APRUEBA Y RATIFICA LA CONVENCION AMERICANA SOBRE DERECHOS HUMANOS CELEBRADA EN SAN JOSÉ, COSTA RICA, 1969" ("LAW APPROVING AND RATIFYING THE AMERICAN CONVENTION ON HUMAN RIGHTS, SIGNED AT SAN JOSÉ, COSTA RICA, 1969"), DECREE NO. 174, *LA GACETA*, 26 NOVEMBER 1979 (TRANSLATION APPEARS IN DOCUMENT 9, DEPOSITED WITH THE COURT)

[Not reproduced]

Annex 71

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT (AID), *ANNUAL BUDGET SUBMISSION, FY 83 (NICARAGUA)*, VOL. 1, JUNE 1981 (EXCERPTS)

[Not reproduced]

Annex 72

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, "UNITED STATES ASSISTANCE TO NICARAGUA", 13 JULY 1979-31 MAY 1981

[Not reproduced]

Annex 73

NICARAGUAN PERMANENT COMMISSION ON HUMAN RIGHTS, *REPORT 1983* (ANNUAL REPORT)

In 1983 the Standing Committee for Human Rights in Nicaragua received a total of 1,127 complaints, involving a total of 1,744 cases handled by our lawyers. These were classified under 11 headings, as shown in the following table:

1.	Torture	106	6%*
2.	Deaths	15	1%
3.	Missing persons	209	12%
4.	Trade unions	99	6%
5.	Freedom of expression	5	0.29%
6.	Threats of arrest	37	3%
7.	Political rights	81	5%
8.	Religious rights	23	2%
9.	Education	4	0.23%
10.	Releases	180	11%
11.	Prisoners	989	57%

The most numerous category was prisoners, representing a total of 989 cases reported by their relatives, equivalent to 57 per cent of all the cases handled by the CPDH. In turn, 548 of all the prisoners reported were arrested by the State Security, accused of counter-revolutionary activities.

A total of 207 people were reported missing; in percentage terms, 99.9 per cent of these were arrested by the State Security. Missing persons accounted for a total of 12 per cent of all the cases handled by the CPDH. The greatest numbers of disappearances occurred in March, September and February. It should be mentioned that the vast majority of the cases reported in February and March relate to complaints and evidence from "Miskito" citizens, arrested by members of the State Security and subjected to considerable harassment.

Until August, disappearances represented an estimated 29 to 30 per cent of all the cases reported. Our negotiations in favour of these people succeeded in clarifying the whereabouts and determining the legal situation of 50 per cent of missing persons reported; the vast majority of the other half corresponding to Atlantic Coast cases are still missing.

The category of torture accounted for 6 per cent of the cases reported, i.e., 104 people, who at the time of arrest or while held in the cells were subjected to beatings and various types of psychological torture.

Trade unionists reported being persecuted, intimidated and harassed by State Security; the category of violations of trade-union rights is equivalent to almost 6 per cent of all the cases reported to the CPDH.

Throughout the year 81 cases of violations of political rights were reported, equivalent to 5 per cent of the cases reported to our office.

While the figures for violations of religious rights (2 per cent) and of educational rights (0.23 per cent) seem to be low in relation to the others, account should be taken of the fear many people have of denouncing events of this kind.

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* These percentages are illustrated in the form of diagrams at the end of this report.

* * *

UNEXPLAINED DEATHS

Of the seventeen unexplained deaths reported in 1983, six cases correspond to peasants arrested in the areas of Quilali, Nueva Segovia and subsequently reported as "died in combat". Two cases were described as deaths "while attempting to escape" and seven were people arrested by clearly identified authorities and who were later reported to have died and their bodies handed over with no explanation: one victim was a 79-year-old Miskito who died in prison through lack of medical attention and the other was a young man who died while the police were attempting to arrest him. The CPDH put all these cases before the appropriate authorities but only one of them is being investigated by the police prosecution office.

UNEXPLAINED DEATHS REPORTED TO THE CPDH IN 1983

1. Pedro Pablo Holles Gonzalez, 20; Antonio Holles Gonzalez, 16; Alfonso Castillo Ramirez, 20; Jonas Castillo Ramirez, 19; Juan Benito Herrera Jarquin, 16; Justo Pastor Gonzalez Quintero, 20. All arrested in the Valle Las Delicias, Quilali, Ocotal; later reported dead in combat in a MINT communiqué.
2. Juan Pablo Joya Pichardo and Jorge Leonidas Chamorro Perez, reported dead in a MINT communiqué, some days after both had escaped from the Carcel Modelo. The MINT gave no further details of these deaths.
3. José Ramon Siles Perez, 25. Arrested in Kilambe, Jinotega. His decomposing body was found some days later.
4. Alfredo and Fausto Tercero, arrested at Rancho Grande, Matagalpa; they were held for a few days, and their family was later informed that they had been executed while being transferred from prison and they were shown the place where their bodies lay.
5. Daniel E. Sierra Ocon. Arrested in Juigalpa. He supposedly "committed suicide" in prison with a pistol and silencer, on the day he and his wife learned of his release.
6. José Esteban Lazo Morales. Arrested in San Pedro de Lovago. His body was later handed over to the family without further explanation.
7. Juan Eusebio Lopez Blanco. Arrested when alighting from a bus, by plainclothes officers. His decomposing body was found later.
8. Reynaldo Canales Moreira. Died at his home while resisting police arrest.
9. Teofilo Maik Benles, 79. Died in prison after remaining there for over a year without ever appearing before a judge. The CPDH had asked for a reprieve for him owing to his poor state of health.

MISSING PERSONS

Last year, 1983, a notable increase was observed in the number of people reported missing in relation to 1982.

There were common factors in the vast majority of the cases arising as regards the circumstances surrounding each case:

1. There was proof of their arrest.

2. The arrests were carried out by members of the State Security or the Sandinista People's Army.
3. The reasons for the arrests were charges of alleged counter-revolutionary activities.

Most missing persons cases reported came from the areas of Chinandega, Matagalpa, Jinotega, Nueva Segovia and the department of Zelaya.

One of the causes of these disappearances is the practice used by the State Security units for transferring prisoners from their place of origin (where the arrest was made) to the regional operational base of the State Security Prison where the prisoners are held incommunicado. During this period which may last up to several months, prisoners are not allowed to inform their relatives of their detention, and the State Security even denies that they are being held.

Clearly the incidence of cases of this type is greater in the provinces, as there are no offices to give information to the public about detainees or the charges on which they are being held. Quite the opposite occurs; access to people wishing to obtain information about the prisoners held in these interrogation centres is denied or restricted.

In 1983 the CPDH made inquiries about two prisoners held by members of State Security and missing for over a year; all efforts to locate them were in vain. Some time later the accused came to our offices to say that they had been released and that for the whole year they had been kept incommunicado in El Chipote, where all knowledge of them had been denied.

LIST OF PEOPLE REPORTED TO THE CPDH AS MISSING IN 1983

1. Joaquin Idanuel Vallecillo Sanchez, 16, bachelor, a farmer resident in Chinandega. He was arrested at his home on 18 February 1983 at 6.00 a.m. by six men, three in plain clothes and the other three in military uniforms, who arrived in a green jeep belonging to the Government; they also searched his home claiming that they were looking for arms. Attempts to find him in the State Security prison in the 2nd Region and Managua were in vain.
2. Santos Marcelo Martinez Garcia, 35, married, a farmer resident in Boca de Bana, district of the department of Nueva Segovia. He was detained on 6 January 1983 at his home by Quilali border guards; however, we searched for him in vain at the Quilali command post and Ocotal, Esteli and Matagalpa prisons.
3. Felix Alejandro Martinez Garcia, 25, married, a farmer resident in Bana Centro, district of Wiwili, department of Nueva Segovia. He was detained, together with his brother Santos Marcelo, on 6 January 1983 by Quilali border guards. His relatives were recently informed that they had been found dead, but it has not been possible to confirm this.
4. Felix Pedro Gonzalez Barrera. Detained on 23 February 1983, in the vicinity of Bodega de Encafe, in Pantasma, district of the department of Jinotega and subsequently taken to the local command post where he was deprived of food for two days. After this, his relatives were informed that he had been released, but they have not seen him since the day he was arrested.
5. Bayardo Ramon Madrigal Benavides, 43, married, a farmer resident in Managua. In July 1982 he was released after completing a three-year sentence handed down by the Special Courts of Justice.

   He was detained on 11 March 1983 in Chinandega when he was going to the fields to pick cotton; his relatives do not know where he was taken after his arrest. A search was made for him at the prisons of Chinandega, Leon and Managua and also at the State Security prison for the 2nd Region. On

9 December 1983 the State Security prison at Quinta Ye announced that he had never been detained there.

6. Juan Pablo Picado Gonzalez, 33, bachelor, a farmer resident at Santa Maria de Pantasma, district of the department of Jinotega. He was arrested on 12 April 1983 at Cuatro Esquinas de Pantasma and taken to the Pantasma command post. Here, it was announced that he had been transferred to Matagalpa but there was no trace of him at the prisons of Matagalpa or Jinotega.
7. William Raymundo Vallejos Martinez, 29, married, a shopkeeper. He disappeared on 3 January 1983 while travelling along the road from Chinandega to Managua. He was driving a Fiat car, registration MA-ZS-565, which was found abandoned on 8 February in the resort of Las Penitas. His relatives had been informed that he was being detained at the prison known as "Quinta Ye", but the authorities denied that he had been or was being detained there. A search was made for him at the prisons of Managua, Leon and Chinandega, but he could not be found.
8. Juan Garcia Rivas, 43, married, a farmer resident in Bijao Norte, district of Matagalpa. He was arrested on 12 April 1983, at the Hacienda El Carmen, Bijao Norte, by a number of military personnel. His relatives do not know where he was transferred to after his arrest.
9. Lino Garcia Amaya, 28, married, a farmer resident in Bijao Norte, district of Matagalpa. He was arrested on 12 April 1983 together with his father, Mr. Juan Garcia Rivas, both members of the Association of Agricultural Workers (ATC). A search was made for them in various prisons in Matagalpa and Jinotega. According to the latest reports to their relatives, they have been transferred to Puerto Cabezas. However, the local Ministry of the Interior office has not confirmed this story.
10. Pedro Joaquin Moreno Lumbi, 22, bachelor, a farmer resident in San José de la Mula, district of the department of Matagalpa. He was arrested on 18 April 1983 at the Hacienda San Francisco, in Pancasan, department of Matagalpa, but there are no details of where he was transferred after his arrest. His brother was told in July of that year that he had died while attempting to escape, during a transfer from Matiguas to Matagalpa, but the authorities in Matagalpa have not confirmed this story.
11. Pastor Cruz Herrera, 26, bachelor, a farmer and resident in San Marcos de Abajo, district of San Rafael del Norte, Jinotega. He left his home in the company of some friends on 17 May 1983 since when he has not returned. On 3 June 1983 his relatives were informed that he was being detained in the State Security prison known as Las Tejas for questioning, and that they should return in 15 days to hear the results of the investigation. When they returned on 16 June they were informed that he had been transferred to Jinotega on the orders of State Security. His relatives were also informed by a prisoner who was released that he had indeed been held in Las Tejas, since they had been together in the same cell, but the State Security prisons of Jinotega and Matagalpa denied that he was being held there.
12. Ramon Salinas Lopez, 46, married, a carpenter resident in Waslalita, department of Matagalpa. He was arrested on 13 March 1983 in the place known as El Naranjo, and subsequently transferred to the Waslala command post. His relatives were unable to find him in this place or in the Matagalpa or Jinotega prisons.
13. Zacarias Blandin Castro, 40, married, a farmer resident in El Guabo, district of Muy-Muy Viejo, department of Matagalpa. He was arrested on 20 March 1983 for alleged counter-revolutionary activities. He was later transferred to

the place known as El Coloso. His relatives were unable to trace him in a number of prisons in Matagalpa, Matiguas and Managua.

14. Angel Alvarez Urbina, 42, widower, a stockbreeder resident in El Coral, district of Nueva Guinea, was detained on 30 May 1983 at his home supposedly by members of the State Security and transferred to Nueva Guinea. His relatives were informed that he was being held at the State Security prison in Juigalpa, but they were unable to obtain any information about him there.
15. Delmira Blandon Vda. De Suarez, 42, widow, a housewife resident in Pancasan, department of Matagalpa. She went missing on 6 April 1983 in Siuna, department of Zelaya, where she had gone to attend an appointment with Mr. Otilio Duarte, Chief of State Security of Siuna, and Mr. Santos Lopez, UNAG leader, to receive a cow of hers, taken from her illegally. Since that date she has not been seen at her home.
16. Jorge Alberto Urrutia Solis, 18, bachelor, a farmer resident in La Paz Centro, missing since 5 February 1983 when he was on his way from his house to the town of Leon. According to the report of a former army colleague to his relatives, he was arrested in a place called Las Colinas, near Momotombo, and taken for detention in Chinandega. In the January prior to his disappearance, a number of army colleagues came to fetch him from his home, saying that they were to arrest him since they had been informed that the young man was involved in counter-revolutionary activities. The young Urrutia Solis had been in the Sandinista People's Army for two years and at the time of his disappearance had left the service of the army.
17. Calixto Collado Flores, 42, married, a farmer resident in San José, district of Somotillo, department of Chinandega. He was detained on 23 April 1983, in the sector of Rio la Ceiba, near the border with Honduras. He was blindfolded at the time of his arrest and the identity of his captors is unknown.
18. Coronado Garcia Castro, 34, bachelor, a farmer resident in El Guapinol, district of the department of Jinotega. He was arrested on 20 August 1983 in Jinotega and allegedly transferred to the prison known as Las Tejas in Matagalpa where it is denied that he is held; neither could he be found at the command posts or prisons of Jinotega or Matagalpa.
19. Felipe Santiago Jimenez Gutierrez, 38, bachelor, a farmer resident in San Pedro de la Calles, district of San Juan de Telpaneca, department of Madriz. He was arrested on 30 August 1983 at his home, accused of collaborating with counter-revolutionaries, by six men in military uniforms serving at the San Juan de Telpaneca command post. His relatives subsequently visited this place and were able to recognize his captors, but they denied that he was held in the command post. Attempts to find him in the prisons of La Barranca and La Chacara in Esteli were in vain.
20. Felix Alberto Estrada Sandoval, 26, bachelor, a painter resident in Managua. He was arrested in February-March 1983. According to reports given to his relatives he was arrested in a war zone, and prisoners released from El Chipote prison have said that he is held there. However, this was repeatedly denied.
21. Eusebio Sobalvarro Blandon, 22, bachelor, a farmer resident in Linda Vista area of Jinotega.
22. Oscar Sobalvarro Zeledon.
23. Juan Chavarria Arteta.
24. Manuel de Jesus Duarte Sobalvarro.
25. Juan Diaz Mairena.

26. Cruz Chavarria Arteta.
27. José Zeledon Rizo.
28. Domingo Flores Palacios.

    The above were detained on 22 October 1983 between El Cua and San José del Bocay, in the department of Jinotega, by members of the State Security. Their relatives do not know where they were transferred after their arrest, as they have subsequently looked for them in the prisons of the Matagalpa and Jinotega Penitentiary System and the State Security prisons in these two cities, where it is denied that they are being held. However, one of the young men detained, together with those mentioned, named Jorge Vargas Rivera, 19, bachelor, a bus conductor resident at the same address as the other detainees, claims that they are being held prisoner at the Carlos Fonseca command post of the city of Matagalpa, but here they have denied that the other young men detained with him on the same day are being held.
29. Basilio Rodriguez Martinez, 34, married, a farmer resident at La Venada, district of La Azucena, Rio San Juan. He was detained by members of the Sandinista police. His relatives were informed that he had been transferred to the prison of Granada, but they searched for him in vain.
30. Marcos Antonio Martinez Rios, 19, bachelor, a student.
31. Armando Rios Martinez, 20, bachelor, a farmer.

    The above were detained together in Sebaco on 1 December 1983, probably by members of the State Security, since on 8 December 1983 members of the Matagalpa State Security Force appeared at the Valle El Jocote, where these young men lived, to make other arrests.

* * *

TORTURE AND MALTREATMENT OF PRISONERS

During 1983, over 100 cases of torture or cruel, inhuman or degrading treatment were reported to our offices. Humiliating treatment from arrest and interrogation until the end of the sentence was reported constantly, by relatives and prisoners alike, under the constant threat of reprisals to those who make such statements.

Arrest in the middle of the night when the families were asleep was the "new method" of 1983. In many cases the prisoners were subjected to severe beatings upon arrest, were immediately handcuffed hand and foot and thrown onto the floor of the vehicles in which they were taken to the investigation centres; during the journey the prisoners were subjected to the vilest insults and threats. In rural areas prisoners had their hands bound behind their backs and were compelled to walk long distances in this way, being beaten on the way. Cases have been reported in which the authorities cannot find the person they are looking for and so detain another member of the family until they arrest the person originally wanted.

Subsequently, the prisoners are subjected to various tortures and maltreatments by the State Security Operations Units, notably being deprived of food for several days and, sometimes, of water, as according to the investigators "food has to be earned with a statement". We have also received reports of prisoners being hung by their hands for three or four days and then interrogated. Prisoners regarded as "dangerous" are held in hermetically sealed cells with no light, and only a small tube in the ceiling for ventilation; when such prisoners are allowed visits by their relatives they experience great pain in their eyes on coming out into the light. Beatings during interrogations are still a widely used "interrogation method", especially in the departments in the interior of the country.

The situation of prisoners in general has deteriorated considerably during the past year, especially for those in the Carcel Modelo, galleries 1, 2 and 3, and in the prison known as Zona Franca, in Block No 3. We could say that massive repression of these thousands of prisoners reached a peak during 1983; the implementation of an inhuman visiting system in which a prisoner receives a visit from one relative only, for half an hour every four months; the limit on incoming provisions of 20 pounds every four months, to allow the prisoner to supplement the lean prison diet of a small spoonful of rice and beans twice a day. Unexpected searches or inspections during which the accused are compelled to lie on the floor for hours under threat of arms and the fact that after these searches the accused are deprived of all their personal effects, including the mattresses on which they sleep, have often been reported to our offices. A new method used last year consisted of prisoners serving sentences in Zona Franca and the Carcel Modelo being transferred innumerable times both to State Security prisons, in the El Chipote complex, and to prisons in the various departments of the country, where they were subjected to maltreatments and held for days without food. According to our information, when prisoners are transferred they travel in hermetically sealed vehicles, handcuffed together into a gigantic human chain. The lack of visits, prohibition of prisoners to be exposed to sunlight, the reduction in food rations and solitary confinement in special cells, are examples of "punishments" used against the prisoners held in the prisons mentioned.

* * *

RELEASE ORDERS WITHHELD

The Standing Committee for Human Rights in Nicaragua is still receiving many complaints from relatives of prisoners who say that, despite the judicial authorities issuing release orders for them, the National Penitentiary System has ignored such decisions and held the prisoners without justification. The CPDH has taken the appropriate steps with the relevant authorities, but no positive results have so far been achieved in this direction.

We made an appeal on behalf of their relatives to the Ruling Junta for National Redevelopment and the Ministry of the Interior, asking them to rectify this unjust and arbitrary practice, violating the general principles of law and international human rights agreements.

As a consequence, Dr. Rafael Cordova Rivas, member of the Ruling Junta, announced that as a "special concession", for the World Human Rights Day, some of these prisoners would be released, when in fact it was an obligation they should have met immediately.

Extract from *Barricada*, Monday, 12 December 1983.

On Human Rights Day Cordova Rivas announces:

More humanitarian measures for Somocista prisoners

All former Somocista guards, as well as criminals judged by the People's Antisomocista Courts, who have served their sentences and are still detained under the State of Emergency, are to be released in honour of the International Human Rights Day.

The announcement was made on Saturday by Dr. Rafael Cordova Rivas, member of the Ruling Junta for National Redevelopment at the opening of the Leonte Herdocia Ortega House of Human Rights in Managua to commemorate the 35th International Human Rights Day.

At the same time he said that at the request of the National Commission for the Promotion and Protection of Human Rights (CNPPDH) the revolutionary government had decided to transfer prisoners from sealed cells in the semi-open system to the Open System Farm, which had housed the Miskitos released on 6 November.

The member of the Ruling Junta explained that this measure would be applied to prisoners who had records of excellent behaviour and who had expressed a wish to work on the agricultural jobs available in the Open System Farm.

Despite the attempt of North American pressure to break the will of the revolutionary government in this country and so prevent the promotion of human rights, these decisions are a demonstration of the will of the Ruling Junta and the FSLN to maintain and consolidate the peace which has been won.

At the opening ceremony of the Leonte Herdocia Ortega House of Human Rights, comrade Miguel Angel Aviles, Second President of the CNPPDH, condemned North American aggression and the setting up of military bases in Honduran territory; "we cannot give up the right of the Nicaraguan people to self-determination and to continue with social progress", he added.

He believed that the first obligation of the CNPPDH was to claim the right of self-determination for the Nicaraguan people and he appealed to all peace-loving peoples to lobby their respective governments for the end of imperialist aggression against Nicaragua.

In addition to Dr. Cordova Rivas and Mr. Miguel Angel Aviles, the relatives of Leonte Herdocia, comrade Ramiro Lacayo, Third Vice-President of the CNPPDH and other members of the Committee were also present at the opening ceremony.

PRISONERS WHOSE RELEASE ORDERS HAVE BEEN WITHHELD

Name	*Date of Release Order*
Roberto Antonio Aburto Palacios	02/09/83
Daniel de Jesus Gonzalez Miranda	22/02/83
José Francisco Gonzalez Guillen	01/03/83
José Domingo Guadamuz Guevara	08/09/83
Domingo Hernandez Rodriguez	20/09/83
Teodoro Maradiaga Gonzalez	08/09/83
Joaquin Arnulfo Pereira Useda	05/09/83
Alfonso Antonio Rosales Garcia	02/09/83
Manuel Salvador Sanchez Potosme	22/09/83
Reynerio Talavera Mendez	02/09/83
Daysi del Socorro Guerrero Melendez	28/02/83
Armando Davila Martinez	13/05/83
José Ramon Cruz Peralta	06/05/83
Ramon Gutierrez Lopez	08/09/83
Carmelo Sanchez Gonzalez	25/04/83
Vicente Taisigua Sandoval	25/04/83
Cesar Augusto Gutierrez Arrieta	13/10/83
Horacio Antonio Gomez Ampie	28/10/83
Hermogenes Rafael Rayo Sandoval	08/10/83
Bayardo José Balmaceda Ortiz	04/11/82

José Armando Paz Cardoza	12/04/83
Juan José Alcantara Urbina	12/10/83
Humberto Antonio Peralta Gaitan	19/10/83
José René Delgadillo Obando	16/11/83
Rosa del Carmen Flores Espinales	07/12/82
Anastasio Sequeira Angulo	16/11/83
Daniel Arturo Angulo Sequeira	16/11/83

PRISONERS AWAITING TRIAL

Fifty-three prisoners have been waiting in prison for several months for the military authorities and the Ministry of Justice to decide to send their cases before the judge. This problem has been a continuing one ever since the State of Emergency was declared in 1982, since there is no legal recourse to oblige these officials to carry out justice. There are already many cases of prisoners who have died of illnesses and accidents in custody while waiting for a judge to look at their case and declare them innocent.

LIST OF PRISONERS AWAITING TRIAL WITH NO DEFENCE SINCE THEIR ARREST

Name	*Date of Arrest*
Felipe Betancourt Zepeda	May 1982
Ronald Martinez Hernandez	3 July 1982
Ernesto Picado Hernandez	10 October 1982
Jorge Ignacio Ramirez Zelaya	21 May 1983
Reynaldo Garcia Moya	24 June 1983
Juan Raudales Mangas	24 June 1983
Miguel Castillo Gutierrez	24 June 1983
Edgard de Jesus Toruno Raudales	24 June 1983
Julio Roque Huete	June 1983
Simon Roger Cruz Benavides	30 June 1983
José Eleodoro Miranda Perez	18 July 1983
Francisca Ramona Membreno Ruiz	11 August 1983
José Daniel Navarrete Espino	11 August 1983
Luis Salvador Aranda Mairena	26 August 1983
Carlos Enrique Maradiaga Baldizon	28 August 1983
Orlando Dargaespada Araica	17 August 1983
Mario Antonio Aburto Flores	1 September 1983
Ricardo Octavio Gaitan Villalobos	1 September 1983
Dionisio Guadalupe Salgado Estrada	1 September 1983
Domingo German Rivas Quezada	1 September 1983
Cristobal de Jesus Gutierrez Membreno	1 September 1983
Enrique José Braford Coulson	1 September 1983
Ricardo Lopez Miranda	4 September 1983
Pedro Aguilar Granera	4 September 1983
Roger Alejandro Jiron Cruz	13 September 1983
Norma Yasmin Hurtado Borge	24 September 1983
Gustavo Adolfo Molina Siles	26 September 1983
Modesto de los Santos Payan Aguirre	27 September 1983
Roberto Arana Baez	26 September 1983
Pedro Jesus Espinoza Pulido	26 September 1983
Marcial Guzman Perez	27 September 1983
Domingo Ezequiel Aguilar Lopez	27 September 1983

Eduardo Llano Ramos	27 September 1983
Raul Llano Ramos	27 September 1983
Francisco Adolfo Saenz Mejia	27 September 1983
Armando Rostran Pulido	28 September 1983
Hernan Serrano Cerda	29 September 1983
Roger Guzman Bolanos	October 1983
Vicente Marquez Aleman	24 October 1983
Mauro Gonzalez Mercado	10 November 1983
José Antonio Barquero Estrada	8 November 1983
Mario Miguel Mendoza Mayorga	8 November 1983
Arcedio Antonio Ortiz Espinoza	5 November 1983
Narciso Silva Gaitan	6 November 1983
Orlando Mendoza Laguna	12 November 1983
Boanerges Matus Lazo	13 November 1983
René Osman Mora Sandino	13 November 1983
Orlando Napoleon Molina Aguilera	14 November 1983
Enoes Urbina Hernandez	14 November 1983
Vicente Zamora Gomez	15 November 1983
Juan de Dios Aguilar Garcia	15 November 1983
Roque Jacinto Blandon Rivera	16 November 1983
Francisco del Carmen Guardado Rodriguez	13 November 1983

SITUATION OF THE TRADE UNIONS IN 1983

When summarizing events in the field of trade unions during 1983, we must analyse the situation from two points of view. On the one hand is the situation of the independent workers' organizations which are subject to continual public discredit campaigns and whose members have had to confront a wide range of problems. On the other hand we have the violation of trade-union freedoms which has been common to all trade-union organizations and it is a fact that there is no right to strike in Nicaragua.

Although the Nicaraguan Government has signed international agreements in which it guarantees freedom of association in trade unions, there were constant complaints of cases of trade-union repression to the CPDH offices in Nicaragua during 1983: detention, threats of arrest, harassment, attacks by "turbas" (commandos) and dismissals at all levels of independent trade-union members, have given these organizations a hard time over the past year.

Agricultural sector

The farmers organized into independent trade unions have suffered the most, at the hands of both the military authorities and members of operational bodies of the FSLN (ATC, CDS, MPS). Detentions — in most cases lasting 3 to 6 months — and constant pressure and harassment to leave the ranks of their respective trade unions or to become informers of the State Security have been a general tactic used against peasants belonging to the CTN, in the rural areas of Zelaya Sur (Nueva Guinea), Matagalpa, Granada, Esteli and Leon. Some peasants belonging to the CTN were detained and then went before the Anti-somocista People's Courts; the CPDH has inexplicably been denied any information about these cases.

It is extremely worrying that in some parts of the country members of trade unions affiliated to the CTN have been attacked by elements led by members of the Asociacion de Trabajadores del Campo and members of the Sandinista

People's Militias; this happened to the "El Mombacho" Workers' Union in Hacienda La Luz, in the department of Granada, whose installations were destroyed last October and their leaders were saved from death by the intervention of the workers.

One case that attracted international attention, as much from human rights organizations as from a number of European governments, is that of ten peasant leaders from the Jalapa area, in the department of Nueva Segovia, who were detained from October 1982 until December 1983 in the Esteli Penitentiary System, under the orders of the State Security, without being charged by any judicial authority. The charge against them was that they were "potential enemies of the revolution".

Urban sector

Among city workers belonging to the independent trade unions, repression has taken the form of summonses in which they are obliged to sign "cooperation agreements" and for the "defence of the revolutionary process"; detention on charges such as "disrespect for authority" or "boycotting production". When workers are released they most often find that they have lost their jobs.

On the first of May 1983, during a mass at the church of Don Bosco in the city of Managua to celebrate "International Labour Day", the "turbas" (commandos) appeared and proceeded to beat up those they identified as union leaders. The Sandinista police looked on but did not intervene. Subsequently, some of those beaten up were detained and taken to the Bello Horizonte police station for interrogation.

One of the trade unions suffering most beatings in the urban category last year was the Union of Urban Transport Drivers (SIMOTUR), a large number of its members being drivers for the National Bus Company (ENABUS). Numerous members of this union were dismissed for "indiscipline at work", after "discussion" of their cases by the employer and the representatives of the Central Sandinista de Trabajadores. In November, the main leaders of this union were jailed in El Chipote, accused of "counter-revolutionary activities". Some are still in the Zona Franca prison to this day.

National leaders

The main leaders at national level of the independent workers' organizations have not escaped the risks run by the grass-roots members, although the treatment has been more selective. Besides the constant smear campaigns in the official news media, the main independent workers' leaders have been summonsed by various authorities of the Ministry of the Interior, where they are "warned" about their activities. Others have been detained for several hours in order to "investigate" the vehicles in which they travel which are frequently involved in assaults or robberies. The number of violations of trade-union rights rose during 1983.

VIOLATIONS OF POLITICAL RIGHTS

The general treatment of the various opposition political parties took the form of a lack of guarantees for the normal development of their activities. 1983 was characterized by the suspension of freedom of expression, meeting, movement and the absence of legal guarantees, restricting Nicaraguans' political activities to the absolute minimum. Besides the lack of opportunities for pluralism, the government and its mass organizations carried out a campaign of discredit, threats, aggression and arrests against the leaders and their party bases; this manifested itself in many forms throughout the country, so confirming its intention to eliminate political pluralism in the true sense of the word. Faced with this escalating repression which grew in the first half of 1983, the government has kept no favorites and has not even respected the representatives of these parties on the Council of State, who are supposed to have parliamentary immunity.

By means of discredit, insult and defamation, the official news media attack the leaders and militants of the democratic groups, without even a right of reply.

In December 1983 the Sandinista government again promised elections, supposedly for 1985. The CPDH considers that a democratic system cannot be improvized in one year; at present there is no electoral law, it is not known what kind of elections are to be carried out, nor what is to be elected. As long as the present climate of the suspension of freedom of expression, meeting and movement prevails, these declarations will be nothing more than mere promises. The Sandinista government must implement concrete action to demonstrate its intention to give Nicaraguans the right to self-determination.

Some of the cases presented to our office are described below:

- Francisco Rodriguez, Feliciano Polanco and Julio R. Montes, christian-socialist leaders. They were held in custody for a year because of their membership of the PSC.
- Felix Pedro Espinoza, conservative leader. He was detained, threatened, beaten up, insulted and expelled from his native town. He was a member of the Council of State.
- Brenda Mayorga de Ramos. She was interrogated and detained for her participation and cooperation in the Christian-Socialist Party. She was pressurized into becoming an informer for the State Security.
- Mario José Castillo and Carlos Sanchez Narvaez, conservative leaders. Detained for their supposed involvement in an attack against the Nicaraguan Chancellor. They were pressurized into informing against other members of the Conservative Party.
- Enrique Sotelo Borgen, conservative leader. Arrested and kept incommunicado for two weeks for alleged suspicions against him. Suffered psychological harassment in prison.
- Julio Rosales, christian-socialist leader. He was summonsed on a number of occasions by the State Security in Leon.
- Eduardo Berrios Marin. He received death threats and was intimidated by a member of the army owing to his membership of the Conservative Party.
- Cristobal Martinez and Eusebio Garcia Tellez, christian-socialist leaders who were detained for several months for their political activities.
- Miguel Angel Manzanares and Azucena Ferrey, social and national leaders of the PSC, whose houses were attacked by FSLN mass organizations.

VIOLATION OF RELIGIOUS RIGHTS

The authorities of the Sandinista government and their mass organizations have carried out persecution against the authorities of the Catholic Church and the Christian Movements, instead promoting a parallel so-called "People's" church, with the aim of dividing the believing population. The basis of this supposed division is the ideological struggle in which they use weapons such as slander and defamation which are echoed in the State and official media.

As a repressive measure they have imposed rigorous censorship on Radio

Catolica, the official voice of the Church, and imposed a watch on priests who are constantly followed by strangers.

In connection with the Pope's visit to Nicaragua in March 1983, the government carried out a number of acts through its organizations which cast doubt on the invitation to His Holiness the Pope. The best known were the censorship imposed on the news media on everything relating to the Pope's visit, the prevention of christian groups outside the government from actively participating in the reception of the Pope, both at the airport and in the various places where the Pontiff appeared, the offensive manipulation of the broadcast of mass and the interference with the microphones and loudspeakers used for the Pope's speeches and the disrespect for the celebration of Eucharist which was often interrupted with shouts and party slogans.

Monsignor Miguel Obando, Archbishop of Managua, was the victim of repeated attacks, as well as a smear campaign against him. The sentiments, symbols and traditions of the Catholic Church are continually ridiculed in pamphlets and pseudo-comic programmes.

Members of the christian movements have been jailed by the State Security which describes their pastoral activities as counter-revolutionary.

Participants in processions and pilgrimages made for Holy Year have been victims of physical attacks by the Sandinista Party shock troops which receive the open support of the Sandinista police.

In the Jinotega mountains, the Sandinista People's Army has taken possession of the chapels of El Cedro, El Cua, Cano la Cruz and San José del Bocay, and set fire to those of El Tigre and Aguas Calientes.

During October, the official news media mounted a campaign against the pastoral activities carried out by the Salesian Congregation in Nicaragua, which culminated in the deportation on 1 November 1983 of the Spanish Salesian priests Luis Corral Prieto and José Maria Pacheco. Both were accused by the Sandinista régime of carrying out political activities to the detriment of the Law on Patriotic Military Service. In an arbitrary gesture, these two priests were expelled without the authorities being able to inform the Nicaraguan Episcopal Conference of the decision or to put up a defence against the charges.

1. Antonio Celis Estrada. Accused of deviationism for using quotations from the Bible in his classroom examples.
2. Oscar Francisco Fonseca Montalvan. Attacked for belonging to the Youth Congregation of the Blood of Christ.
3. Santos Enrique Flores Martinez. The 19 July Sandinista Youth and CDS considered his meetings in the church to be suspicious.
4. Pablo Antonio Detrinidad Obando. Arrested for belonging to the Youth Congregation of the Blood of Christ.
5. Protest of the Presbyterian Council of the Archdiocesis of Managua against the attacks, slander and insults of some elements of the media against the archbishop.
6. Parish councils present a protest on the publications denigrating the person of Monsignor Carballo and the Catholic faith of the Nicaraguan people.
7. Dina Elizabeth Santamaria Flores, a Salvadoran evangelist preacher, expelled by Migration, accused of ideological deviationism.
8. Juan Miguel Eslaquit Aragon. Summonsed to make a statement at the command post after mass organizations made paintings on his house, accused of inducing christian youth groups to interfere with the revolutionary process.
9. The participants in a pilgrimage were attacked by mass organizations. At a later date the State Security arrested some of the participants.

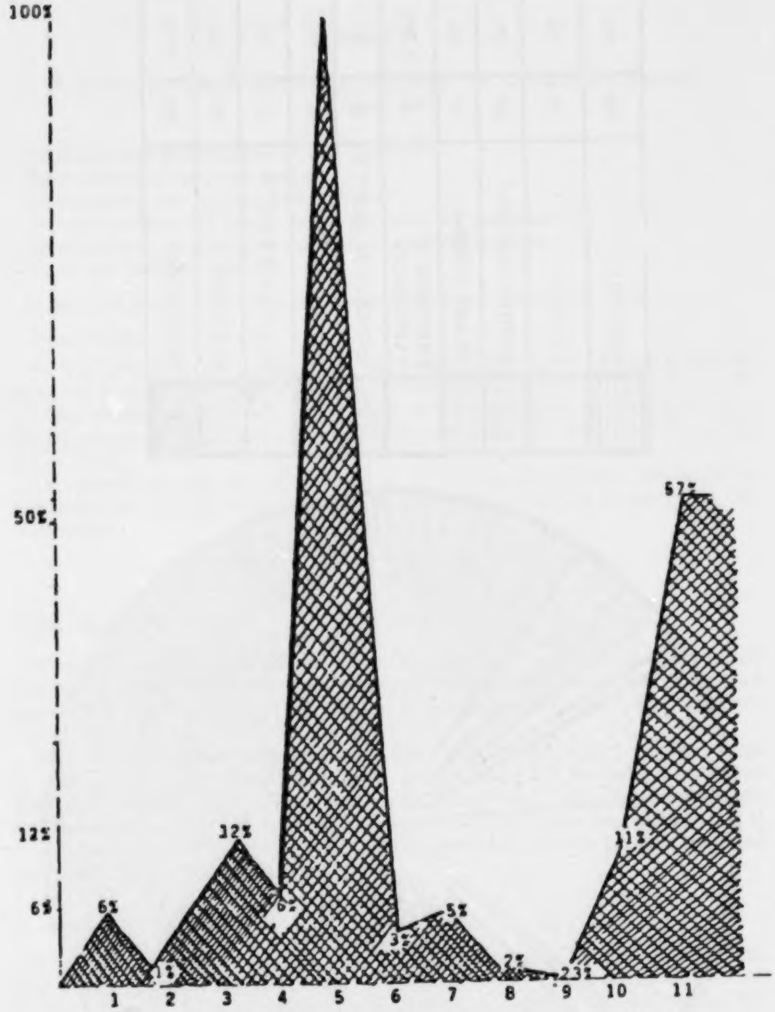
10. Rolando José Alvarez Lagos, Manuel Antonio Guillen, Francisco Rodriguez Roman, Fatima Carolina Sequeira Chavarria, José Manuel Gutierrez Chavez, Pedro Rafael Gutierrez Chavez, Matil Margarita Ruiz, Rolando Ivan Chavez, arrested by the State Security for belonging to the Youth Pastoral movement, accused of boycotting the Patriotic Military Service.
11. José Maria Pacheco, a Salesian priest expelled by the government, accused of boycotting the Law on Patriotic Military Service.
12. Luis Corral Prieto, Salesian priest, expelled by the government, accused of boycotting the Law on Patriotic Military Service.
13. A member of the Salesian Youth Movement governing body was arrested by the Sandinista police, which described a prayer vigil to be held at the Don Bosco Youth Centre as a black mass.
14. The Prelature of Jinotega denounced abuses against the human dignity of its parishioners by the EPS which burnt chapels and converted the chapel of San José del Bocay into a brothel.
15. A group of young christians of Chinandega who were going to a meeting in the city of Leon were taken off the public transport bus in which they were travelling, for interrogation, and were photographed by the authorities.

*

The statistics assembled in relation to the cases of violations of human rights indicate that 1983 was really a very serious year for the Nicaraguans. The high number of arbitrary arrests, the lack of legal guarantees, the suspension of political rights, the lack of freedom of expression, the outrages and mockery against the Catholic leaders, the setting up of political courts without legal guarantees, the outrages against young people refusing to be recruited into the armed forces and the pressure on people to become informers of the State Security, have been constantly increasing in 1983. December seemed to show signs of promise with the release of some Miskitos and other political prisoners. However, we are deeply sceptical about the possibility of an improvement in the general situation. Events have shown that so far no attempt is being made to solve the structural problem, but rather purely cosmetic measures are dictated. If the government really wants reconciliation, if it is really looking for an improvement in the human-rights situation, it should begin by lifting the State of Emergency, grant freedom of expression, movement and meeting, trade-union and religious freedom, restore legal guarantees, abolish the Political Courts and grant an amnesty. Otherwise, everything it does is just propaganda for export purposes.

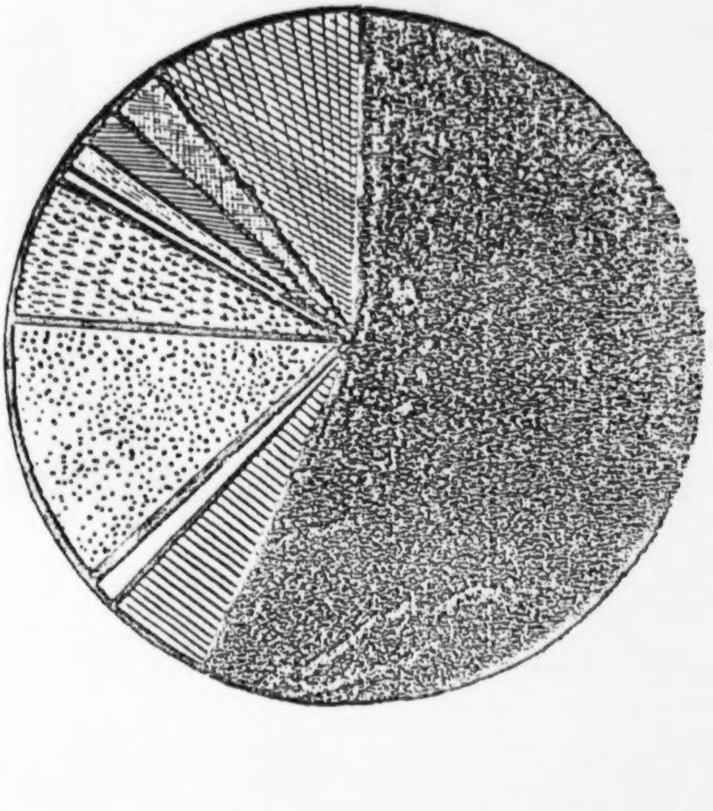
Managua, 12 January 1984.

GRAPH OF CASES REPORTED TO THE CPDM



PIE CHART OF CASES REPORTED TO THE CPDH IN 1983

▥	TORTURE	106	6%
□	DEATHS	15	1%
░	MISSING PERSONS	209	12%
▦	TRADE UNIONS	99	6%
□	FREEDOM OF EXPRESSION	5	0.29%
▩	THREATS OF ARREST	37	3%
▨	POLOTICAL RIGHTS	81	5%
░	RELIGIOUS RIGHTS	23	2%
▨	RELEASES	180	11%
▓	PRISONERS	989	57%



Annex 74

"Pastoral Letter on Reconciliation from the Nicaraguan Bishops", 22 April 1984

To the priests and deacons in our dioceses:
To members of religious orders:
To catechists and bearers of the Word:
To our brothers and sisters in the apostalic lay movements:
To principals, teachers and students in Catholic schools:
To all our beloved faithful:

Grace and peace from God our Father and Jesus Christ our Lord.

Dear brothers and sisters:

At this solemn Easter celebration, the ultimate expression of God's love for mankind through the redemption, we invite you to share more fully in the spiritual wealth of the Holy Year, which will be extended in Nicaragua by a special concession from Pope John Paul II until June 17, 1984, the feast of the Holy Trinity.

This extension and the urgent need in our society for sincere and brotherly reconciliation through individual conversion have moved us to send you this exhortation.

I. DOCTRINAL SECTION

1. Sin, the root of all evil

When sin came into the world, all things were changed profoundly; the soil yielded brambles; civilizations and institutions passed away; man himself rebelled against his fellow men, and the empire of tyranny and death began (cf. Gen. 3:16-19; 4:7-8).

Man, created in the image of God (Gen. 1:26) did not wish to acknowledge or glorify Him; man became vain in his imagination, and his foolish heart was darkened (Rom. 1:21). There were also those who, like Satan, disguised themselves as angels of light to deceive others and lead them to perdition (cf. II Corinthians 11:14-15). A poorly understood anthropocentrism plunged mankind into the heavy bondage of sin.

2. Redemption by Christ

Christ, by His death and resurrection, has reconciled us to God, to ourselves, and to our brothers and sisters, has freed us from the bondage of sin (cf. Col. 1:20-22, Cor. 5:18), and has given His church the mission of transmitting His message, pardon and grace (cf. Mt. 28:18-20, Mk. 15-20).

All this should be for us a call to conversion; it should be the beginning of a radical change in spirit, mind and life* (cf. John Paul II, Bull, "Open the Doors to the Redeemer", No. 5).

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* Unless otherwise indicated, quotations throughout the letter have been translated without reference to any official English text.

There are three aspects to this conversion, which redeems our individual and collective lives:

(a) We must avoid personal sin, any act that disrupts our baptismal alliance with God.
(b) We must banish any sinful attitudes from our hearts, that is, any habitual rejection, whether conscious or unconscious, of Christian standards and moral values.
(c) We must put an end to such sins of society as participation in injustice and violence.

3. Sin after the redemption

Nonetheless, sin has persisted in the world since our redemption by Christ, because:

(a) Man abuses his freedom and does not accept God's grace.
(b) Society has become secularized and is no longer oriented toward God; it does not heed the church, the universal sacrament of salvation, but considers it an alienating institution.
(c) At times it claims to accept Christ and His teachings, but it repudiates the church and thereby falls into the temptation of establishing other "churches" than the one founded by the apostles and their successors, the legitimate bishops.
(d) We forget that coexistence can only be based on an accurate perception of the individual as an intelligent, free and religious human being, with rights and duties devolving from his very nature (cf. John XXIII, Enc. *Pacem in Terris*, No. 9-10).
(e) Materialistic concepts of mankind distort the person and teachings of Christ, reduce man to merely physical terms without taking account of his spiritual nature, so he remains subject to physical forces called the "dialectics of history". And man, alienated from God and from himself, becomes disoriented, without moral and religious reference points, without a higher nature, insecure and violent.

II. OUR SITUATION

1. The problem of sin in the world

Pope John Paul II, in his message for the 17th World Day of Prayer for Peace on January 1, 1984, expressed his concern about the current world situation, a concern which we, too, share:

> "Peace is truly precarious, and injustice abounds. Relentless warfare is occurring in many countries, continuing on and on despite the proliferation of deaths, mourning and destruction, without any apparent progress toward a solution. It is often the innocent who suffer, while passions become inflamed and there is the risk that fear will lead to an extreme situation."

2. In Nicaragua

A. Belligerent situation:

Our country, too, is plagued by a belligerent situation pitting Nicaraguan against Nicaraguan, and the consequences of this situation could not be sadder:

Many Nicaraguan youths and men are dying on the battlefields.

Many others look toward the future with the fear of seeing their own lives prematurely ended.

A materialistic and atheistic educational system is undermining the consciences of our children.

Many families are divided by political differences.

The suffering of mothers who have lost their children, which should merit our great respect, is instead exploited to incite hatred and feed the desire for vengeance.

Farmworkers and Indians, for whom the Church reserves a special love, are suffering, living in constant anxiety, and many of them are forced to abandon their homes in search of a peace and tranquility that they do not find.

Some of the mass media, using the language of hate, encourage a spirit of violence.

B. The Church:

One, albeit small, sector of our Church has abandoned ecclesiastical unity and surrendered to the tenets of a materialistic ideology. This sector sows confusion inside and outside Nicaragua through a campaign extolling its own ideas and defaming the legitimate pastors and the faithful who follow them. Censorship of the media makes it impossible to clarify the positions and offer other points of view.

3. Foreign interference

Foreign powers take advantage of our situation to encourage economic and ideological exploitation. They see us as support for their power, without respect for our persons, our history, our culture and our right to decide our own destiny.

Consequently, the majority of the Nicaraguan people live in fear of their present and uncertainty of their future. They feel deep frustration, clamor for peace and freedom. Yet their voices are not heard, muted by belligerent propaganda on all sides.

4. The root of these evils

This situation is rooted in the sin of each and every one, in injustice and oppression, in exploitative greed, in political ambition and abuse of power, in disregard for moral and religious values, in lack of respect for human dignity, in forgetting, abandoning and denying God.

III. RESPONSE OF THE CHURCH

1. Conversion and reconciliation

The Church ardently desires and encourages peace and tranquility and believes that there is only one path to that end, conversion. This means that we must all turn our eyes and heart to God, our Father, who through Christ offers us the true path to reconciliation, forgiveness and peace.

> "It is not behavior alone that needs to be changed, but the heart that guides our lives. At the community level it is important to examine ourselves as persons, as groups and social units, not only as victims but also as authors of certain collective deviations from God's plan, in order to implement together God's plan for constructive human endeavor." (Cf. Peace and Conversion, a Pontifical document issued by the Commission on Justice and Peace at Rome on September 30, 1983.)

The entire universe is the object of redemption since it also reveals the glory of God and must be sanctified and consecrated to God (cf. Vatican II, Const. Lumen Gentium, No. 34). Christ resurrected is at the center of history and of the world, leading us toward its full maturity and its final liberation from all the forces of evil (cf. Vatican II, Const. Lumen Gentium, No. 48).

2. Confession: the path to conversion

John Paul II in his address on reform and holiness given at Rome on November 26, 1983, said:

> "To assist such conversion, the Lord instituted the sacrament of reconciliation. In it Christ Himself goes to meet the man oppressed by the awareness of his own weakness, He raises him and gives him the necessary strength to continue his path. With the sacrament the life of the Resurrected Christ enters the spirit of the believer, bringing forth renewed generosity of purpose and an enhanced capacity to live by the Gospel."

Jesus reconciled all things, bringing peace through the Cross (Col:20) and transmitted this power to His disciples (cf. Jn4:21, 13:34-35, 12-17).

Preparing to receive the benefits of the sacrament of confession is an important step in conversion. A sincere examination of our sins, self-criticism of our attitudes and our life, these reveal to us our faults and make us abhor sin which is an offense against God, an affront to the Church, and damage or injury to our neighbor. It encourages us to turn totally to God and to reform our lives, it brings us back to the Church and closer to our brothers.

3. Dialogue

The road to social peace is possible through dialogue, sincere dialogue that seeks truth and goodness. "That [dialogue] must be a meaningful and generous offer of a meeting of good intentions and not a possible justification for continuing to foment dissension and violence." (John Paul II, Greeting to Nicaragua, March 4, 1983.)

It is dishonest to constantly blame internal aggression and violence on foreign aggression.

It is useless to blame the evil past for everything without recognizing the problems of the present.

All Nicaraguans inside and outside the country must participate in this dialogue, regardless of ideology, class or partisan belief. Furthermore, we think that Nicaraguans who have taken up arms against the Government must also participate in this dialogue. If not, there will be no possibility of a settlement, and our people, especially the poorest among them, will continue to suffer and die.

The dialogue of which we speak is not a tactical truce to strengthen positions for further struggle but a sincere effort to seek appropriate solutions to the anguish, pain, exhaustion and fatigue of the many, many people who long for peace, the many, many people who want to live, to rise from the ashes, to see the warmth of a smile on a child's face, far from terror, in a climate of democratic harmony.

The terrible chain of reactions inherent in friend-enemy dialectics is halted by the word of God, who demands that we love even our enemies and that we forgive them. He urges us to move from distrust and aggressiveness to respect and harmony, in a climate conducive to true and objective deliberation on our problems and a prudent search for solutions. The solution is reconciliation. (Cf.

John Paul II, Peace and Reconciliation. Address by the Pope in El Salvador, March 6, 1983.)

If we are not open to objective acknowledgement of our situation and the events that distress our people ideologically, politically and militarily, then we are not prepared, in a true and Christian way, for reconciliation for the sake of the real, living wholeness of our nation.

Considering that freedom of speech is a vital part of the dignity of a human being, and as such is indispensable to the well-being of the nation inasmuch as a country progresses only when there is freedom to generate new ideas, the right to free expression of one's ideas must be recognized.

The great powers, which are involved in this problem for ideological or economic reasons, must leave the Nicaraguans free from coercion.

CONCLUSION

If we want our conversion to find true expression in the life of our national community, we must strive to lead lives worthy of the Gospel (cf. Ph1:27, Ep4:1), reject all lies, all harmful or offensive words, all anger and evil utterance, and be benevolent and forgive generously as God forgave us through Christ (cf. Ep4:25-32, Col3:12-14).

It behooves us to value each life as a gift of God, help the young to find meaning and value in their lives and prepare themselves for their future roles in society, forgive enemies and adversaries, facilitate the return of those who have left their country and welcome them with an open heart, free those imprisoned for ideological differences, create a climate of friendship and peace conducive to social harmony.

"In the great task of bringing peace and reconciliation to the nation, the family as the basic unit of society cannot be ignored. Nor can respect for its rights." (Cf. Gaudium et Spes N.52, quoted by John Paul II in his address to the bishops of El Salvador, February 24, 1984.)

May the Holy Virgin, who played her part in our redemption with such exemplary fortitude, provide us with the necessary strength to perform our Christian duty of love and peace.

And may the Lord of Peace grant us all, always and in all our endeavors, the peace and tranquillity which we seek (cf. 2 Th3:16).

Done at Managua, April 22, Easter Sunday, 1984 (to be read and published in the usual manner), Episcopal Conference of Nicaragua.

Pablo A. Vega,
Bishop of Juigalpa
President.

Miguel Obando Bravo,
Archbishop of Managua.

Leovigildo Lopez Fitoria,
Bishop of Granada.

Salvador Schlaeffer B.,
Bishop of Bluefields.

Pedro L. Vilchez V.,
Prelate of Jinotega.

Bosco Vivas Robelo,
Assistant Bishop of Managua,
Secretary.

Julian Barni,
Bishop of Leon.

Ruben Lopez Ardon,
Bishop of Esteli.

Carlos Santi,
Bishop of Matagalpa.

Annex 75

COMMENTS OF COMMANDER OF THE REVOLUTION AND COORDINATOR OF THE JUNTA OF NATIONAL RECONSTRUCTION DANIEL ORTEGA SAAVEDRA, MANAGUA DOMESTIC SERVICE, 25 APRIL 1984, AS TRANSCRIBED IN *FOREIGN BROADCAST INFORMATION SERVICE*, 26 APRIL 1984

[Interview with Daniel Ortega Saavedra, commander of the revolution and coordinator of the Junta of National Reconstruction, by unidentified reporters after presiding over the opening session of the International Labor Union Meeting for Peace, in Managua; date not given — recorded]

[Text] [Ortega] I believe that the pastoral letter clearly expresses the political stand of the Nicaraguan Episcopal Conference. It is a political stand of helping and supporting the US Administration's warmongering plans against the Nicaraguan people. This is a stand much like others taken in the past when the Nicaraguan bishops openly supported the Somozist dictatorship. Following the dictator Somoza Garcia's death, he was buried by these same bishops with honors befitting a prince of [word indistinct]. This is the same policy of the period of US intervention when this country's bishops blessed the weapons of the US Marines who landed here to carry out occupation plans and [word indistinct] in our country.

Therefore, we can say that history is repeating itself with the actions of the top Nicaraguan church officials. However, we hope that this document, which was signed by all the bishops, does not have the approval of all of them. As is known, the Episcopal Conference puts forward the opinion of the majority, and once a majority consensus is reached the other bishops embrace that decision, even though they may not approve.

This pastoral letter is part of the internal destabilization plan that is a complementary and essential part of the aggression from abroad. We are sure that Reagan and the US Administration are praising this letter which plays up to this aggressive policy that has been condemned by US bishops as well as by the world — a policy now being defended by some Nicaraguan bishops.

[Reporter] Commander, is the US Administration awaiting the appointment of a new ambassador to the United States after rejecting Nora Astorga's nomination?

[Ortega] We are analysing this situation. We have already expressed our stand on this. We will not act with the same irresponsible attitude as that administration; we have given consideration to the person suggested by the United States and the credentials will be extended in due time.

[Reporter] What is your opinion on the use of chemical weapons against Nicaragua?

[Ortega] Well, we do not doubt that the C.I.A. has contemplated the use of chemical weapons within their plans to cause more harm to the Nicaraguan people.

[Reporter] What has been the outcome of the negotiations involving those abducted to Costa Rica?

[Ortega] Well, those abducted to Costa Rica have already been claimed by the revolutionary government; we have made specific requests to the Costa Rican

Government and Foreign Ministry. We understand that the return of these prisoners to Nicaraguan territory will begin today.

[Reporter] Is the Contadora Group still effective?

[Ortega] We believe that the Contadora Group is a mechanism at our disposition, that it is a constructive mechanism. The United States is conducting an all-out effort to destroy this mechanism because it logically works toward peace and, therefore, against US policy.

[Reporter] Could you comment on the conference's proposal of a dialogue with the contras?

[Ortega] As I said, they are simply echoing the US Administration's policy. It is completely absurd that those who are demanding a dialogue with the contras have not even accepted a dialogue with the revolutionary government. We must note that we proposed this dialogue following the meeting that we had [word indistinct] a few months ago. The members of the Nicaraguan Episcopal Conference have rejected a dialogue with the revolutionary government. This is an absurd situation, because these people refuse a dialogue within the country, but want the government to hold talks with those who are killing the Nicaraguan people.

This would sound logical from a Christian viewpoint, but this is an anti-Christian attitude of these bishops who refuse to talk with the people and the revolution. The bishops want [words indistinct] solution. This is an anti-Christian stand that plays up to the Reagan administration's policy — a policy of intervention.

Annex 76

"LEY DE EMERGENCIA ECONOMICA Y SOCIAL" ("LAW OF ECONOMIC AND SOCIAL EMERGENCY"), *LA GACETA*, 10 SEPTEMBER 1981 (ENGLISH TRANSLATION PROVIDED)

[Spanish text not reproduced]

[Source: *La Gaceta*, Managua, Nicaragua, 10 September 1981, No. 205]

JUNTA OF GOVERNMENT

Law on the State of Economic and Social Emergency

Decree No. 812

The Junta of Government of National Reconstruction of the Republic of Nicaragua,

Whereas:

1. The economic reconstruction of our country requires a climate of internal stability and order which encourages production, employment and discipline.

2. The conservation and strengthening of social peace is a primary obligation of the government and of all Nicaraguans so that our model of a mixed economy and political pluralism will not be diminished but will develop fully.

Therefore:

In the exercise of its authority,

Decrees:

Article 1. In conformity with Article 49 of Decree No. 52 of August 21, 1979, and Article 28 *(c)* of Decree No. 388 of May 2, 1980, a state of economic and social emergency is decreed throughout the national territory for one year from the date of promulgation of this Decree.

Article 2. The Junta of Government shall in each instance empower the appropriate Ministers of State to enforce the necessary administrative measures for the application of this Law.

Article 3. For the purposes of this Law, the following persons shall be considered to have committed crimes against the economic and social security of the nation and shall be punished by imprisonment for one to three years:

(a) persons who cause a planned suspension of public or private transportation;

(b) persons who destroy raw materials, agricultural or industrial products, production instruments or infrastructure, to the detriment of national resources or consumers, irrespective of the criminal liability incurred by the commission of other offenses;

(c) persons who spread false information intended to provoke changes in prices, wages, foodstuffs, clothing, merchandise, stocks, securities or currency;

(d) persons who engage in acts of sabotage against production centers, markets or warehouses to obstruct production or supply efforts;

(e) persons who encourage the raising or lowering of prices in the market, hoarding any type of goods, products or securities, or using other means of speculation;

(f) persons who incite, abet or participate in initiating or continuing a strike, stoppage or takeover at work sites;

(g) persons who encourage or participate in invasions or takeovers of land in violation of the provisions of the Agrarian Reform Law;

(h) persons who incite foreign governments and international credit institutions to carry out actions or make decisions which are injurious to the national economy.

Article 4. The penalties set forth in the preceding article shall be enforced by means of the procedure described in Decree No. 5 of July 20, 1979, and its amendments.

Article 5. The exercise of the right mentioned in Article 50 of Decree No. 52 of August 21, 1979, as it pertains to the application of this Law by the competent authorities and to the provisions of Article 32, are suspended throughout the national territory. Consequently, exercise of the right to institute an amparo proceeding against administrative measures taken in application of this Law by the authorities mentioned in Article 2 thereof is suspended.

Article 6. This Law is public policy and shall enter into force today upon publication in any mass medium, without prejudice to its subsequent publication in *La Gaceta*, the official journal.

Done in the city of Managua on September 9, 1981.

Junta of Government of National Reconstruction,
(Signed) Sergio Ramírez Mercado.
(Signed) Rafael Córdova Rivas.

Annex 77

"LEY DE EMERGENCIA NACIONAL" ("LAW OF NATIONAL EMERGENCY"), *LA GACETA*, 20 MARCH 1982 (ENGLISH TRANSLATION PROVIDED)

[Spanish text not reproduced]

[Source: *La Gaceta*, Managua, Nicaragua, 20 March 1982, No. 66]

NATIONAL EMERGENCY LAW

DECREE NO. 996

The Junta of the Government of National Reconstruction of the Republic of Nicaragua,

Whereas:

1. The plans of aggression directed against our country constantly assume more concrete forms and are designed to disturb the peace of the nation, destroy our production system and the country's physical infrastructure, prepare an escalation of counterrevolutionary military attacks, and, consequently, supplant the power of the people with a régime on the Somoza pattern.

2. In recent weeks significant facts have come to light on the existence of covert plans directed by US secret agencies in complicity with bands of former Somozan guardsmen and counterrevolutionary groups based in Miami and Honduras, and involving the support of some Latin American military régimes. These plans include, *inter alia*:

(a) The training of an international mercenary force to conduct, from Honduran territory, military attacks, sabotage and terrorism in Nicaragua;

(b) The generous financing of counterrevolutionary bands and paramilitary groups from various Latin American nations and of right-wing political and labor organizations within Nicaragua to enable them to engage in acts of economic and political destabilization and pave the way for armed aggression.

3. Those plans have already had concrete results such as the blowing-up, on Sunday, March 14, of the bridge on the River Negro, on the highway leading to the border post of El Guasaule in the Department of Chinandega, and the partial demolition of the bridge at the entrance to Ocotal, on the highway leading to the border post of Las Manos in the Department of Nueva Segovia, both actions carried out by criminals based in Honduras. The destruction of these bridges is in keeping with the sinister plan, which according to US news media has already been approved, to destroy and blockade communication routes in Nicaragua which are allegedly used for supplying arms to El Salvador, an allegation serving as an excuse for aggression against the heroic people of Nicaragua.

4. Other criminal schemes, whether abortive ones, such as the destruction of the national cement factory and the oil refinery, or carried to completion, such as the detonation of a bomb in an Aerónica aircraft at the Mexico City airport and the detonation of another bomb in Sandino Airport's terminal at Managua, serve to confirm the aforesaid plans.

5. It is the duty of the Revolutionary Government and the entire nation to focus all moral, political, social, economic and human energy on the defense of

our country and the revolution in order to thwart acts of terror and destabilization which attempt merely to snatch from the humble and industrious people their revolutionary victory and the right, conquered with blood and heroism, peacefully to build a new society free of poverty and oppression.

Therefore,

By virtue of its powers, decrees the following:

National Emergency Law

Article 1. Throughout the national territory the rights and guaranties set forth in Decree No. 52 of August 21, 1979, are hereby suspended, excepting the provisions of Article 49 (2) of said decree.

Article 2. The present suspension of rights and guaranties shall have a duration of 30 days and may be extended in accordance with circumstances prevailing in the country.

Article 3. This decree supersedes Decree No. 812 of the Economic and Social Emergency Law and shall be in effect from the date of its publication in any medium of mass communication, without regard to its subsequent publication in the official journal *La Gaceta.*

Done at Managua, March 15, 1982, "Year of Unity in the Face of Aggression".

Junta of the Government of National Reconstruction. — Daniel Ortega Saavedra — Sergio Ramírez Mercado — Rafael Córdova Rivas.

Annex 78

ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, *ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1982-1983* (EXCERPTS)

[Not reproduced]

Annex 79

THE INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES, *THE MILITARY BALANCE 1977-78*, LONDON, 1978 (EXCERPT)

[Not reproduced]

Annex 80

1980 NICARAGUAN ORDER OF BATTLE, BASED ON FIGURES COMPILED BY THE UNITED STATES GOVERNMENT FROM UNCLASSIFIED SOURCES

[Not reproduced]

Annex 81

1982 NICARAGUAN ORDER OF BATTLE, BASED ON FIGURES COMPILED BY THE UNITED STATES GOVERNMENT FROM UNCLASSIFIED SOURCES

[Not reproduced]

Annex 82

1984 NICARAGUAN ORDER OF BATTLE, BASED ON FIGURES COMPILED BY THE UNITED STATES GOVERNMENT FROM UNCLASSIFIED SOURCES

[Not reproduced]

Annex 83

THE INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES, *THE MILITARY BALANCE 1983-1984*, LONDON, 1984 (EXCERPTS)

[Not reproduced]

Annex 84

ARTURO CRUZ, "SANDINISTA DEMOCRACY? UNLIKELY", *NEW YORK TIMES*, 27 JANUARY 1984

[Not reproduced]

Annex 85

TEXT OF NICARAGUAN HIGHER COUNCIL OF PRIVATE ENTERPRISE (COSEP) STUDY ON THE ELECTORAL PROCESS, *LA PRENSA*, 26 DECEMBER 1983, AS TRANSCRIBED AND EXCERPTED IN *FOREIGN BROADCAST INFORMATION SERVICE*, 5 JANUARY 1984

[Not reproduced]

Annex 86

"FACE THE PEOPLE" PROGRAM WITH COMMANDER DANIEL ORTEGA SAAVEDRA AND JUNTA MEMBER SERGIO RAMIREZ MERCADO, MANAGUA DOMESTIC SERVICE, 28 JULY 1984, AS TRANSCRIBED AND EXCERPTED IN *FOREIGN BROADCAST INFORMATION SERVICE*, 31 JULY 1984

[Not reproduced]

Annex 87

ALIANZA REVOLUCIONARIA DEMOCRATICA (ARDE), *FOR PEACE AND DEMOCRACY IN NICARAGUA*, 20 FEBRUARY 1984

UNIDAD SANDINISTA DE MISKITOS. SUMOS Y RAMAS (MISURASATA)
MOVIMIENTO DEMOCRATICO NICARAGUENSE (MDN)
FRENTE REVOLUCIONARIO SANDINO (FRS)
FRENTE SOLIDARIDAD DEMOCRATA CRISTIANO (FSDC)
SOLIDARIDAD DE TRABAJADORES DEMOCRATICOS NICARAGUENSES (STDN)

FOR PEACE AND DEMOCRACY IN NICARAGUA

On the eve of his death, General Augusto Cesar Sandino, symbol of our nationality, deplored the high cost that we would have to continue to pay to achieve peace and social justice.

Fifty years after his sacrifice, his fears have been fully confirmed. Nicaragua has undergone a drama of vast proportions in this half century, the social contradictions and causes of which are still present. For this reason, we, Nicaraguans, must think first and foremost of our country, to minimize the high cost in human lives that we are paying for our political tragedy.

ARDE has declared that its differences with the FSLN derive from the anti-democratic system that has been imposed by that government in our country. We have proposed in numerous occasions the necessity to search for political solutions with the hope to put an end to the national crisis. However, the lack of response to our initiatives has compelled us to take up weapons.

On this occasion, we wish to stress our position on the electoral process to the people of Nicaragua, to the democratic sectors within the FSLN and to the international community. We are nationalist revolutionaries. We believe in consolidating the achievements of the revolution within a democratic framework that would guarantee authentic and effective pluralistic participation. Only in this context, the different political tendencies of the nation could participate in facing our multiple problems.

We insist on this last point, because an electoral process that excludes the exiled democratic forces, would only serve to exacerbate the national contradictions and to frustrate the expectations for peace and regional securities. On the basis of these and other considerations that have been pointed out by our alliance, we present the following basic conditions that might render an electoral process trustworthy:

1. The point of departure to put an end to the violence that afflicts the nation is for the FSLN to agree to an electoral compromise that would permit the participation, without exceptions, of all representative forces and their leaders in our country.
2. The FSLN must demonstrate a genuine commitment to democracy and must end the superimposition of government functions over those of the party, and must particularly separate the army's functions from those of the party in power.
3. The electoral process should take place within a climate of national

reconciliation, under the supervision of a Latin American instance, with the appropriate legal instruments guaranteeing that legal procedures and arbitration are applied throughout.

4. All public liberties must be restored and appropriate measures should be created to guarantee the political activities of all opposition forces, through the creation of favorable conditions for all political party activities.

5. The rules of the electoral process must be clearly defined. The basic guidelines for our parties must be established, and it must be pledged, publicly and formally, that the electoral results will be respected, even if they are adverse to the FSLN.

6. The various forms of institutionalized repression must be eliminated and the internationalists and foreign military officers who are playing roles that rightly belong to Nicaraguans must be sent away.

If the FSLN pledges to take and then does take specific steps to implement these legitimate demands of those who are struggling for the restoration of the revolution's original program, ARDE would suspend military activities, under *a priori* guarantees by countries that have remained neutral in the conflict.

We are not demanding power-sharing with the FSLN. We are only claiming the right of all Nicaraguans to participate in the electoral contest in equal conditions with the party in power. The FSLN has the historic opportunity to prove to the international community that its electoral rhetoric is based on its concern for saving the nation from war and crisis. It should place the national interest before the interest of the party.

We once more declare that we are willing to seek a dignified and true solution to our national conflict. We thus render homage, on this 50th anniversary, to Sandino's aspirations, who said that the highest duty of every good Nicaraguan citizen is to procure peace in Nicaragua.

Sarapiqui, Department of Rio San Juan, Nicaragua, February 18, 1984.
San José, Costa Rica, February 20, 1984.

DIRECTORIO REVOLUCIONARIO DE ARDE.

Annex 88

Declaration of the Nicaraguan Democratic Force of February 21, 1984, 21 February 1984

Nicaraguan Democratic Force (FDN), after carefully weighing our historic national reality and our current problems; and faced with the responsibility of finding a solution to the Nicaraguan civil war and providing for the peaceful coexistence of all Nicaraguans in freedom and democracy, addresses itself to the Junta of the Government of National Reconstruction and requests that the Ministers of Foreign Affairs of the Contadora Group, in their meeting of February 27, 1984, take this document under consideration.

The Nicaraguan conflict, which threatens the political and socio-economic stability of the Central American region, is due both to internal factors and to extracontinental aggression. It is at the same time the immediate and principal cause of the regional crisis.

A bloody war is being waged within Nicaragua at a very high cost in human lives. This makes essential the search for formulas for peace, as was done in June of 1979 through the good offices of the Organization of American States (OAS).

In order to end the bloodshed and prevent the prolongation of this conflict, which continues to disturb the peace of this continent, we propose the following PLAN FOR PEACE AND NATIONAL CONCILIATION, developed on the basis of the Resolution of the XVIIth Conference of Consultation of the Ministers of Foreign Affairs of the Organization of American States, that will facilitate a durable and peaceful solution to the Nicaraguan problem:

1. The immediate substitution of the Sandinista régime.
2. Installation in Nicaraguan territory of a Democratic Provisional Government of National Conciliation, which should include the main democratic groups representative of the opposition to the Somoza and Sandinista régimes, and which should reflect the free will of the Nicaraguan people.
3. Guarantees for the respect of human rights of all Nicaraguans without exception.
4. The initiation within one year of an authentic electoral process, conducted in liberty and surrounded by guarantees before, during and after the casting of the vote that culminates in the election of national authorities. The process should be supervised by groups of nations such as Contadora and institutions, the like of the Organization of American States and the United Nations.

For the initiation and the implementation of this Plan, it is imperative that there exist a state of freedom and full observance of the civil and political rights of citizens, among which must be included the following measures:

(a) The immediate withdrawal of foreign (Cuban, Soviet, Bulgarian, North Korean, Palestinian, East German, etc.) military and security forces that have established themselves as a true occupation army in Nicaragua. At the same time, withdrawal of all international mercenaries involved in public administration, including those given Nicaraguan citizenship after July 19, 1979.

(b) The immediate separation from the Sandinista Armed Forces and other repressive organizations of individuals responsible for crimes against their own people and against humanity.

(c) Suspension of the state of emergency which suspends the civil and political rights of Nicaraguan citizens.

(d) Promulgation of a genuine amnesty Law, covering political offenses.

(e) Derogation of laws which violate internationally accepted standards of human rights, such as Decree 48, the General Law on Communications Media; Decree 1327, the Law on Patriotic Military Service; Decrees 759 and 760 which violate the right to private property; and others.

(f) Derogation of laws restricting freedom of labor unions; reestablishment of the right to strike, the right to bargain collectively, and respect for international labor agreements to which Nicaragua is a party.

(g) Establishment of the rule of Law, through the distribution of the powers of the State among three independent and complementary powers: the Legislative, the Judicial and the Executive.

(h) The establishment of the organs of the State as true national organizations, apart from all political and ideological sectarianism, and the total separation of the Sandinista party from the political and military agencies of the State.

(i) An end to the persecution and extermination of sectors of the Nicaraguan population, especially that unleashed against those of Miskito, Sumo and Rama origin.

(j) An immediate end to religious persecution, and a total separation of the State and the so-called "Popular Church".

(k) Repatriation of all Nicaraguans with full guarantees of their rights as citizens.

(l) Restoration to the Judiciary of its full functions, jurisdiction and autonomy.

(m) Recognition of the legal supremacy, appropriate for Constitutional documents of the Fundamental Statute and the Statute of Rights and Guarantees of the Nicaraguan People.

(n) An end to the arms race and to the aggressions and provocations against the neighboring Republics of Central America.

The new Provisional Democratic Government of National Conciliation will carry out the Provisional Program of Government announced in July of 1979, while the political parties, in open dialog and full inter-party cooperation, arrive at an agreement on full unity and cooperation based on the Pact of "Punto Fijo" signed in Caracas on October 31, 1958, by the Venezuelan parties Democratic Republican Union, Social Christian Party COPEI, and Democratic Action; on the Declaration of Principles and Minimum Program of Government signed by Mr. Romulo Betancourt, Vice-Admiral Wolfgang Larrazabal, and Dr. Rafael Caldera on 6 December 1958; and on other historic accords which establish the basis for democratic government in the Republic of Venezuela.

Nicaraguan Democratic Force (FDN) would immediately agree to suspend all its military actions, if and when the Junta of the Government of National Reconstruction and the National Directorate of the FSLN carry out the above measures, and follow these with the patriotic gesture of separating themselves from public office, to permit the installation of the Democratic Provisional Government of National Conciliation.

Nicaraguan Democratic Force,
(Signed) Adolfo Calero PORTOCARRERO,
President,
National Directorate.

21 February 1984.

Annex 89

PRESS CONFERENCE, EDÉN PASTORA, *AGENCE FRANCE PRESS* REPORT, REPRINTED IN *FOREIGN BROADCAST INFORMATION SERVICE*, 13 JUNE 1984

[Not reproduced]

Annex 90

"LEY COMPLEMENTARIA DEL DECRETO 1477" ("SUPPLEMENTAL LAW TO DECREE 1477"), 6 AUGUST 1984 (UNOFFICIAL TEXT, ENGLISH TRANSLATION PROVIDED)

[Not reproduced]

Annex 91

"CANCÚN DECLARATION ON PEACE IN CENTRAL AMERICA", ANNEXED TO UNITED NATIONS DOCUMENT A/38/303; S/15877, 19 JULY 1983

[See I, *Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, pp. 278-281]*

Annex 92

NOTE BY THE SECRETARY-GENERAL, "THE SITUATION IN CENTRAL AMERICA", S/16041 **, 18 OCTOBER 1983

1. Since the Security Council adopted resolution 530 (1983), on 19 May 1983, I have endeavoured to keep in contact with the Governments of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua, as well as with the Governments of Colombia, Mexico, Panama and Venezuela, which comprise the Contadora Group, in order to keep informed of the efforts made to find a negotiated political solution to the problems in the Central American region and of the developments in the area. On two occasions, on 28 June and 13 July 1983, I reported orally on the situation to the members of the Council.

2. Within the framework of the Declaration adopted at Isla de Contadora on 9 January 1983[1], there was an initial phase of official contacts and visits by the Ministers for Foreign Affairs of the Contadora Group to the countries directly concerned, on 12 and 13 April[2]. As a result of the consultations held, it was agreed to initiate a new phase of joint meetings of the Ministers for Foreign Affairs of the Group with the Ministers for Foreign Affairs of the five Central American countries. The first three meetings were held in Panama City on 20 and 21 April[2], from 28 to 30 May[3] and from 28 to 30 July 1983[4], respectively.

3. On 17 July 1983, the Presidents of Colombia, Mexico, Panama and Venezuela met in Cancún, Mexico. The Declaration issued on that occasion proposed guidelines for the negotiating process as well as specific commitments the implementation of which would ensure peace in the region[5].

4. On the basis of the Cancún Declaration, the Ministers for Foreign Affairs of the Contadora Group and of the five Central American countries met again in Panama City, from 7 to 9 September 1983, and adopted a Document of Objectives[6]. On 6 October, I received a visit from the Minister for Foreign Affairs of Mexico and the Permanent Representatives of Colombia, Panama and Venezuela to the United Nations, who handed me the Document, which, I was informed, had been approved by the Heads of State of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua[7]. At the request of the Contadora Group, the Document is transmitted to the Security Council as an annex to this note.

5. On that occasion, the Minister for Foreign Affairs of Mexico pointed out that the Document of Objectives is a single consensus text, which sets out the positions and the concerns of the Governments directly concerned and the proposals of the Contadora Group, and which contains the principles on which

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[1] A/38/68.

[2] S/15727.

[3] S/15809.

[4] S/15900.

[5] S/15877.

[6] S/15982.

[7] The texts of the communications from the Governments of Nicaragua and Honduras on this subject were circulated to the Security Council as documents S/16006 and S/16021 respectively.

the eventual solution of the Central American problems will have to be based. The Document also contains a definition of the specific areas of negotiation and the terms of reference for the formulation of the legal instruments and the machinery which would be essential in order to ensure harmonious coexistence in the region. I expressed to the Minister for Foreign Affairs of Mexico my fervent hope that the Group's activities would soon achieve substantive and concrete results. I also emphasized on that occasion that any attempt at a solution should take into account the profound economic and social imbalances with which the Central American peoples have always struggled.

6. In transmitting the Document of Objectives to the Security Council, I consider it my duty to express my profound concern at the grave and prolonged tension which persists in the area. In view of the nature and possible ramifications of the convulsive situation currently prevailing in the Central American region, the unavoidable conclusion is that it threatens international peace and security.

7. In communications addressed to the President of the Council and to the Secretary-General, there have been frequent accusations and counteraccusations of foreign interference in the region and complaints of numerous border incidents as well as incursions by sea and by air, causing deplorable loss of life and material damage[1]. In the view of some Governments, the military and naval manœuvres now in progress add to the tensions in the region. It has also been pointed out that the presence of military advisers and training centres, the traffic in arms and the activities of armed groups, and the unprecedented build-up of arms and of military and paramilitary forces constitute further factors of tension. On 13 September, the Security Council met at the urgent request of a Government of the region, which complained of what it described as a further escalation of acts of aggression against its country[2]. Although the Secretary-General has no way of reliably verifying each and every one of the components of this situation and is therefore unable to make definite judgments, there is no doubt that an alarming picture is emerging in the area.

8. The five Governments of Central America have assured me on a number of occasions of their firm commitment to contribute in good faith to the search for peaceful solutions. In that connection, they have also reiterated their determination to co-operate with the Governments of the Contadora Group in their efforts for peace. The Governments of Colombia, Mexico, Panama and Venezuela are motivated by an earnest desire to find solutions adapted to the realities of the region, without any intrusion derived from the East-West conflict. That is why they have the manifest support of the international community as a whole.

9. In accordance with the terms of resolution 530 (1983), I shall continue to keep the Council informed as and when necessary.

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[1] Documents S/15780, S/15787, S/15806, S/15808, S/15813, S/15816, S/15817, S/15835, S/15836, S/15837, S/15838, S/15839, S/15840, S/15855, S/15857, S/15858, S/15879, S/15893, S/15899, S/15930, S/15952, S/15973, S/15979, S/15980, S/15986, S/15993, S/15995, S/16007, S/16011, S/16012, S/16013, S/16016, S/16018, S/16020, S/16022, S/16024, S/16025, S/16026, S/16030, S/16031, S/16032.

[2] Document S/PV.2477.

ANNEX

Document of Objectives

[See I, Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, pp. 283-285]

Annex 93

"THE SITUATION IN CENTRAL AMERICA : THREATS TO INTERNATIONAL SECURITY AND PEACE INITIATIVES", UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 38/10, 11 NOVEMBER 1983

[See I, Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, pp. 290-292]

Annex 94

OAS General Assembly Resolution of 18 November 1983 on Peace Efforts in Central America, AG/Res. 675 (XIII-O/83), Attached as Annex II to United Nations Security Council Document S/16208, 9 December 1983

THE SITUATION IN CENTRAL AMERICA

Note by the Secretary-General

1. On 25 November I received a visit from the Permanent Representatives of Colombia, Mexico, Panama and Venezuela, which comprise the Contadora Group. On instructions from their Governments, they delivered to me a copy of the communication submitted by the Ministers for Foreign Affairs of the Contadora Group to the General Assembly of the Organization of American States, together with the text of the resolution adopted by that Assembly on 14 November 1983 on the topic "Peace efforts in Central America". In accordance with their request, these documents are transmitted to the Security Council as annexes to this note. On the same occasion, they informed me of the calendar of meetings of the Contadora Group, including one at the technical level on 1 and 2 December and another at the level of Ministers for Foreign Affairs later.

2. In the past few days I have also had interviews with the Permanent Representatives of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua, who have made known to me the opinions of their respective Governments concerning the situation in Central America.

3. On this occasion, I must convey to the Security Council my impression that there are certain developments in the situation which, if taken advantage of, would make it possible to entertain hopes of improvement. Since I last reported to the Security Council in conformity with resolution 530 (1983)[1], while the Council has continued to receive communications regarding the situation in the region, taken as a whole they seem to indicate that there has been a reduction both in the number of border incidents and in their scope and magnitude[2]. Similarly, the pace of the efforts of the Contadora Group is accelerating, and in that context diplomatic activity has been redoubled. Furthermore, there is perceptible movement in the position of the Government of Nicaragua, consisting mainly in the submission of proposals within the framework of the efforts of the Contadora Group and in measures which, notwithstanding their domestic nature, take cognizance of certain requirements of the other countries of the region.

4. I must state, however, that the situation in Central America continues to be exceedingly complex and unstable, and that any of the multiple factors which together account for its dangerous character, to which I referred in my note of 18 October and which undoubtedly still exist, can aggravate it again from one moment to the next. Accordingly it is essential, acting in good faith and in a constructive spirit, to evaluate and take advantage of the opportunity which is apparently beginning to emerge.

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[1] S/16041.

[2] S/16037, S/16043, S/16058, S/16059, S/16060, S/16062, S/16080, S/16105, S/16109, S/16110, S/16113, S/16123, S/16127, S/16130, S/16133, S/16141, S/16143, S/16145, S/16161, S/16163, S/16167, S/16168, S/16176, S/16177, S/16180, S/16184, S/16200.

5. For this reason, and in accordance with Security Council resolution 530 (1983), I wish to express my fervent hope that the opportunity offered by the beginning of détente to which I have referred will be used to the full and that all States, whether or not they belong to the region, will co-operate in word and deed to ensure that the efforts of the Contadora Group bear fruit, and that they will refrain from any action or attitude which might have the opposite effect.

ANNEX I

Communication from the Ministers for Foreign Affairs of the Contadora Group to the General Assembly of the Organization of American States

[See I*, Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, pp. 294-295]*

ANNEX II

Peace Efforts in Central America

(Resolution adopted at the seventh plenary session, held on 15 November 1983)

[See I*, Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, pp. 287-288]*

Annex 95

UNITED STATES DEPARTMENT OF STATE, *US EFFORTS TO ACHIEVE PEACE IN CENTRAL AMERICA*, SPECIAL REPORT NO. 115, 15 MARCH 1984

Following are texts of the transmittal letter and report submitted to Congress by Secretary Shultz on March 15, 1984, pursuant to Section 109 (f) of the Intelligence Authorization Act of 1984.

[See I, *Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, pp. 322-335]*

Annex 96

"ACTA LA CONTADORA PARA LA PAZ Y LA COOPERACION EN CENTROAMERICA"[1] ("'ACTA' ON PEACE AND COOPERATION IN CENTRAL AMERICA"), *LA NACION*, SAN JOSÉ, 11 JULY 1984 AND 12 JULY 1984 (ENGLISH TRANSLATION PROVIDED)

THE CONTADORA ACT FOR PEACE AND COOPERATION IN CENTRAL AMERICA

Part I

Commitments

CHAPTER I

General Commitments

Section 1. Principles

The Parties shall undertake to:

1. Respect the following principles:

   - *(a)* Renunciation of the threat or use of force against the territorial integrity or political independence of States;
   - *(b)* The peaceful settlement of disputes;
   - *(c)* Non-interference in the internal affairs of other States;
   - *(d)* Co-operation of States in resolving international problems and promoting respect for human rights;
   - *(e)* Equal rights and free determination of peoples;
   - *(f)* Equal sovereignty and respect for sovereign rights;
   - *(g)* Fulfilment in good faith of the obligations assumed in accordance with international law;

2. In application of these principles:

(a) Abstain from any action inconsistent with the objectives and principles of the United Nations Charter and the Charter of the Organization of American States that impairs the territorial integrity, political independence, or unity of any of the States and particularly any action, that constitutes a threat or use of force.

(b) Solve their disputes by peaceful means, in the United Nations Charter and the Charter of the Organization of American States.

(c) Respect the existing international boundaries between States.

3. Consequently:

(a) Abstain from military occupation of the territory of any of the other States in the region.

(b) Abstain from any type of military, political, economic or other coercive

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[1] Spanish text not reproduced.

act intended to subordinate to their own interest the exercise by other States of the rights inherent in their sovereignty.

(c) Take the steps necessary to guarantee the inviolability of their borders against irregular groups or forces seeking to destabilize the governments of neighbouring States from within their own territories.

(d) Refuse to permit their territories to be used to take action detrimental to the sovereign rights of other States and ensure that the prevailing conditions in their territories do not threaten international peace and security.

4. Respect the principle that no State or group of States has the right to intervene directly or indirectly, through arms or any other form of interference, in the internal or external affairs of another State.

5. Respect the peoples' right to self-determination, without external intervention or coercion, by avoiding the threat or direct or covert use of force to undermine the national unity and territorial integrity of any other State.

Section 2. Commitments relating to a reduction of tension throughout the region

The Parties shall undertake to:

6. Cease political and military activities that are detrimental to peaceful coexistence among the States.

7. Refrain from directly or indirectly promoting activities intended to destabilize the governments of the region, neither supporting nor tolerating groups that conduct activities of this type, and desist from trafficking in arms. Consequently, the Parties shall take the necessary measures, with the legal recourses at their disposal, to block supplies of arms and military equipment intended to destabilize established governments in the Central American region.

8. Prevent the use of their respective territories to attack another territory, and at all times respect the sovereignty, territorial integrity and the political independence and economic infrastructure of the States in the region.

9. Abstain from organizing, promoting, financing, instigating or tolerating subversive or terrorist activities, sabotage or any other form of violence intended to apply pressure to or change the established government of another State in the region.

10. Abstain from issuing or promoting propaganda in favour of violence or war, as well as hostile propaganda against any Central American government. Each of the Parties shall undertake to comply with and disseminate the principles of peaceful coexistence and friendly co-operation.

11. Promote general, beneficial, equitable and non-discriminatory co-operation in order to ensure such co-operation under conditions of mutual understanding and respect.

12. Promote and facilitate cultural exchanges and co-operate in strengthening and developing the common cultural values of the Central American peoples.

13. Jointly seek a comprehensive regional solution that will confront the sources of tension in Central America and ensure the inalienable rights of the people in the face of foreign pressures and interests.

Section 3. Commitments relating to measures to encourage trust

The Parties shall undertake to:

14. Encourage mutual trust by all means at their disposal and avoid any action likely to undermine peace and security in the Central American area.

15. To this end, their respective governmental authorities shall:

(a) Avoid any spoken or written declaration that may aggravate the existing situation of conflict in the area.

(b) Urge the mass media to contribute to understanding and co-operation between the peoples of the region.

(c) Promote more contact and understanding between their peoples through co-operation in all areas related to education, science, technology and culture.

(d) Jointly consider future actions and mechanisms that will contribute to the attainment and improvement of a climate of stable and lasting peace.

16. Comply with the following provisions when conducting military manœuvres:

(a) In the event that national or joint military manœuvres are being conducted in zones within a distance of thirty (30) kilometres from the border, the required prior notification referred to in Part III of this Act shall be given to the neighbouring countries and to the Verification and Control Commission at least thirty (30) days in advance.

(b) The notification shall contain the following information:

I. Name.
II. Purpose.
III. Participating forces.
IV. Geographical location.
V. Schedule.
VI. Equipment and weapons to be used.

(c) An invitation should be extended to observers from neighbouring countries.

16a. The conduct of international or combined military manœuvres shall not be permitted within 30 kilometres of the border or outside that limit when they could be detrimental to the objective or purpose of this Act.

CHAPTER II

Commitments Relating to Political Matters

Section 1. Commitments relating to national reconciliation

The Parties shall undertake to:

17. Take measures to establish and, if appropriate, improve representative pluralistic democratic systems that ensure effective participation by the people, politically organized, in the decision-making process and ensure that various opinion groups have free access to honest and periodic electoral processes, based upon full observance of the rights of citizens.

18. In those cases where deep divisions have occurred within the society, strongly encourage national reconciliation activities that allow fully guaranteed participation by the people in authentic democratic political processes on the basis of justice, freedom and democracy and, to this end, create mechanisms that will permit a dialogue with opposition groups, according to the law.

19. Issue and, if appropriate, ratify, expand and improve laws and regulations that offer true amnesty and allow their citizens to become fully reincorporated in political, economic and social life. In like manner, guarantee the inviolability of life, liberty and personal security for those who accept an amnesty.

Section 2. Commitments relating to human rights

The Parties shall undertake to:

20. Respect and guarantee full respect for human rights and, to this end, comply with the obligations contained in international legal instruments and the constitutional provisions on the subject.

21. Initiate their respective constitutional procedures so that they may become parties to the following international instruments:

(a) International Covenant on Economic, Social and Cultural Rights of 1966.

(b) International Covenant on Civil and Political Rights of 1966.

(c) Optional Protocol to the International Covenant on Civil and Political Rights of 1966.

(d) International Convention on the Elimination of All Forms of Racial Discrimination of 1965.

(e) Convention relating to the Status of Refugees of 1951.

(f) Optional Protocol relating to the Status of Refugees of 1967.

(g) Convention on the Political Rights of Women of 1952. [1953]

(h) Convention on the Elimination of All Forms of Discrimination Against Women of 1979.

(i) Protocol Amending the Convention on the Abolition of Slavery of 1925 of 1953.

(j) Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.

(k) International Covenant on the Civil and Political Rights of Women of 1953.

(l) American Convention on Human Rights of 1969, taking note of its Articles 45 and 62.

22. Draw up and submit the necessary bills to their competent domestic bodies in order to accelerate the process of modernization and updating their legislation, so that it may more effectively promote and ensure due respect for human rights.

23. Draw up and submit bills to their competent domestic bodies in order to:

(a) Guarantee the stability of the judiciary so that its members may act without political pressures and themselves guarantee the stability of lower level officials.

(b) Guarantee the budgetary stability of the judicial branch itself, so that its independence from the other branches is absolute and unquestionable.

Section 3. Commitments relating to electoral processes

The Parties shall undertake to:

24. Take measures to establish and, if appropriate, improve representative pluralistic democratic systems that ensure effective participation by the people in the decision-making process and ensure that various opinion groups have free access to honest and periodic electoral processes, based upon full observance of rights of citizens.

25. In order to attain these objectives, the Central American governments shall undertake to implement the following measures:

(a) Promulgate or amend electoral laws so that elections may be held that guarantee effective participation by the people.

(b) Establish independent electoral bodies that will prepare a reliable voting list and ensure that the process is impartial and democratic.

(c) Establish or, if appropriate, update rules that guarantee the existence and participation of political parties that are representative of the various opinion groups.

(d) Establish a schedule of elections and take measures to ensure participation by political parties under equal conditions.

CHAPTER III

Commitments Relating to Security Matters

Section 1. Commitments relating to arms

The Parties shall undertake to:

26. Stop the arms race in all its forms and initiate negotiations immediately on the control and reduction of the present armaments inventory and military strength.

27. Refrain from introducing new weapons systems that may bring about qualitative or quantitative changes in present war materiel inventories.

28. Refrain from using chemical, biological, radiological and other types of weapons that may be considered excessively harmful or indiscriminate.

29. Submit its present weapons and manpower inventories to the Verification and Control Commission within 30 days from the date of signature of this Act. Inventories shall be prepared in conformity with the basic definitions and criteria contained in the Annex and Point 30 of this section. Upon receipt of the inventories, the Commission shall conduct such technical studies as may be necessary to set the limits of military strength in the States of the region and to stop the arms race, in conformity with the stages, terms and conditions agreed upon.

30. The Parties agree to adopt the following basic criteria for the purpose of determining the levels of military strength in the Central American States that are consistent with regional stability and security requirements:

(a) No armed organization shall seek to establish a hegemony over other individual armed forces.

(b) The definition of national security shall take into account the level of economic and social development prevailing at a given time and the level that is sought.

(c) Formulation of the definition should be based on comprehensive studies of the following points:

(i) Perception of the internal and external security requirements of the State.
(ii) Area.
(iii) Population.
(iv) Distribution of economic resources, infrastructure, and population across the national territory.
(v) Length and features of land and maritime boundaries.
(vi) Ratio of military expenditures to the GDP.
(vii) Ratio of military budget to government expenditures and comparison with other social indicators.
(viii) Geographic features and situations and geopolitical conditions.
(ix) Highest level of military technology appropriate for the region.

31. The Parties shall undertake to:

Initiate the necessary constitutional procedures to sign and ratify or accede to international disarmament treaties and agreements, if they have not already done so.

Section 2. Commitments relating to foreign military bases

The Parties shall undertake to:

32. Refrain from authorizing the establishment of foreign military bases or military schools in their territories.

33. Close existing military bases or training schools in their territories within one year from the signature of this Act.

Section 3. Commitments relating to foreign military advisers

The Parties shall undertake to:

34. Submit to the Verification and Control Commission a report on foreign military advisers and other foreign elements participating in military and security activities in their territories within 60 days from the signature of this Act. The definitions contained in the Annex shall be taken into account in the preparation of the report.

35. Establish a gradual withdrawal schedule for the removal of foreign military advisers and other foreign elements, including [a plan for] the immediate withdrawal of military advisers located in operations and training areas. In establishing the schedule, the studies and recommendations of the Verification and Control Commission shall be taken into account.

36. With respect to advisers performing duties relating to the installation and maintenance of military equipment, a control list shall be established in conformity with the terms set forth in their contracts or agreements. The Verification and Control Commission shall use the control list for the purpose of setting reasonable limits on the number of such advisers.

Section 4. Commitments relating to arms traffic

The Parties shall undertake to:

37. Eliminate internal and external regional arms traffic supplying arms to persons, organizations, irregular forces or armed groups attempting to destabilize the governments of the States Parties.

38. To that end, establish internal control mechanisms at airports, runways, port terminals, border crossing points, land, air, sea and river routes, and any other points or means likely to be used for arms traffic.

39. Report presumed or proven arms traffic violations to the Verification and Control Commission, providing the Commission with sufficient information to enable it to conduct the necessary investigations and to present such findings and recommendations as it may consider appropriate. When applicable, the following criteria shall be used, *inter alia*, for verification purposes:

(a) Origin of the arms traffic: the seaport or airport from which the weapons, ammunition, equipment or supplies were shipped to Central America shall be stated clearly.

(b) Personnel involved: the names of persons, groups, organizations, governments or government representatives who participated in the negotiation shall be stated and it shall be indicated whether the case involves a purchase or a donation.

(c) Type of armaments, ammunition, equipment or other supplies: under this heading shall be described the type of weapon, caliber, country of manufacture, whether the country of origin is not the same as the country of manufacture, and the amounts of each type of weapon, ammunition, equipment or other supplies.

(d) Transportation: the means of ground, ocean or air transportation used to reach the region, including the nationality thereof, shall be reported.

(e) Shipping routes: shipping routes used to reach the Central American territory, including stops made and intermediate points used, shall be described.

(f) Weapons, ammunition, and equipment storage facilities and storage facilities for other types of supplies.

(g) Intra-regional traffic areas and routes: traffic areas and routes and participation by the governments or by government or political organizations in the arms traffic or consent given by them for such traffic shall be described, including the frequency with which such areas and routes are used.

(h) International transportation: determination shall be made of the means of transportation used, the owners of such transportation, and the facilities provided therefore by governments and government or political organizations. Clandestine flights unloading war materiel, the dropping of packages by parachute and the use of fishing boats loaded on the high seas shall be specifically identified as such.

(i) Receiving units: persons, groups and organizations receiving the illegal traffic shall be identified.

Section 5. Commitments relating to the prohibition of support for irregular forces

The Parties shall undertake to:

40. Refrain from lending political, military, financial or other support to individuals, groups, irregular forces or armed groups advocating the overthrow or destabilization of other governments and to prevent, using all means at their disposal, the use of their territory for attacks on other States or for organizing attacks, acts of sabotage, kidnappings, or criminal acts against them.

41. Maintain strict vigilance along their borders to prevent armed activities against neighbouring States.

42. Disarm and remove from border zones any group or irregular force identified as being responsible for acts against a neighbouring State.

43. Deny the use of and dismantle logistical and operational support installations and facilities in their territories used to launch activities against neighbouring governments.

Section 6. Commitments relating to terrorism, subversion and sabotage

The Parties shall undertake to:

44. Refrain from lending political, military, financial or other support to subversive, terrorist or sabotage activities attempting to destabilize the governments of the region.

45. Refrain from organizing, instigating, or participating in acts of terrorism, subversion or sabotage in another State or from permitting activities to be organized within their territories for the purpose of committing such acts.

46. Observe the following international treaties and agreements.

(a) Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking). Done at The Hague.

(b) Convention to Prevent and Punish the Acts of Terrorism taking the Form of Crimes Against Persons and Related Extortion that Are of International Significance.

(c) Convention for the Suppression of Unlawful Acts Against [the Safety of] Civil Aviation.

(d) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons including Diplomatic Agents.

(e) International Convention Against the Taking of Hostages.

47. Initiate, if they have not already done so, constitutional procedures to sign and ratify or accede to the international treaties and agreements referred to in the preceding paragraph.

48. Respect the commitments enunciated in this section without prejudice to other treaties and international agreements on diplomatic and territorial asylum.

CHAPTER IV

Economic and Social Commitments

The Parties shall undertake to:

49. Adopt immediate and effective measures to reaffirm, improve and restructure the Central American economic integration process and to harmonize it with the various forms of political, economic and social organization of the countries of the area. Such measures shall also seek to strengthen the existing economic integration institutions.

50. Conclude agreements and adopt measures to revitalize intra-regional trade within the legal framework of economic integration and in the spirit thereof.

51. Refrain from adopting or supporting coercive or discriminatory measures likely to hamper development of the integration process and normal trade.

52. Avoid the adoption of unilateral measures and discriminatory practices tending to hamper intra-regional trade.

53. Adopt measures designed to strengthen financial institutions, *inter alia*, the Central American Bank for Economic Integration, supporting its fund requests while preserving the decision-making power of the countries of the region, and diversifying its operations.

54. Eliminate intra-regional exchange restrictions and study the possibility of unifying exchange rates for intra-zonal trade, while endeavouring to adopt a common exchange rate policy vis-à-vis the outside.

55. Re-establish the multilateral payments machinery in the Central American Fund of the Common Market and increase payments made through the Central American Clearing House.

56. Initiate new sectoral projects of regional or subregional co-operation, such as the hydroelectric power production and distribution system, the regional food security system supply, and any others which help to create greater and lasting links of interdependence.

57. Jointly analyse formulas for solving the problem of external indebtedness, based on an evaluation of each country, taking into account the critical economic situation of the area, the payment capacity of the countries of the region and the additional flow of resources needed to meet requirements for economic and social development.

58. Speed the process of drafting and subsequent implementation of a new Central American customs régime.

59. Adopt joint measures for the defence and promotion of their exports, integrating, in so far as possible, the processing, marketing and transportation of their products.

The Parties shall undertake to:

60. Complete, if they have not already done so, the constitutional procedures for acceding to the 1951 Convention on the Status of Refugees and to the 1967 Protocol on the Status of Refugees.
61. Adopt the terminology laid down in the aforementioned Convention and Protocol in order to distinguish refugees from other categories of immigrants.
62. Following accession, establish the internal machinery required to enforce the provisions of the aforementioned Convention and Protocol.

Part II

Recommendations

CHAPTER I

Recommendations on Political Matters

The Parties hereby adopt the following recommendations:

1. That the legislative bodies of the Central American States hold regular meetings in alternating venues in order to exchange experiences, contribute to the reduction of tensions and promote better communication and closeness among the countries in the area.
2. That the legislative bodies of the Central American States take measures to establish relations with the Latin American Parliament and its working groups.
3. That the electoral supervisory bodies in each Central American State exchange information and experiences in their field, and that they compile, for purposes of comparative study, the election laws and related regulations in force in each country.
4. The electoral supervisory bodies may be present, as observers, at the various stages of the elections held in the region. For this purpose, an express invitation from the Central American country holding the election shall be required.
5. The electoral supervisory bodies of the region shall hold regular technical meetings at the location and with the agenda agreed by consensus at each preceding meeting. The procedures for convening the first meeting shall be determined by means of consultations among the Central American foreign ministries.

CHAPTER II

Recommendation on Security Matters

Section 1. Recommendations in the field of terrorism, subversion or sabotage

The Parties hereby adopt the following recommendation:

6. Prevent participation in criminal acts within their respective territories by persons belonging to foreign terrorist groups or organizations, by means of co-op-

eration among immigration and police authorities as well as among the appropriate civilian authorities.

Section 2. Recommendations to establish machinery for co-ordination of direct communication systems

The Parties hereby adopt the following recommendations:

7. Establish a region-wide communications system ensuring immediate and timely contact among the competent governmental and military authorities.

8. Establish joint security commissions in order to prevent or resolve conflicts between neighbouring States, and to deal with any other matters of common interest. They recommend, in particular, the establishment of such commissions between the Governments of Honduras and Nicaragua and those of El Salvador and Nicaragua.

9. Reactivate and strengthen already existing bodies of a similar nature, such as the Costa Rica-Nicaragua commission.

CHAPTER III

Recommendations on Economic and Social Matters

Section 1. Recommendations in the economic and social fields

The Parties hereby decide to accept the following recommendations:

10. Convene the Central American Economic and Social Council by July 30, 1984, at the latest, in order to discuss the institutional re-establishment of the process of Central American economic integration.

11. Request ECLA and SIECA [Central American Economic System] to undertake a joint study of the necessary measures and make the appropriate recommendations to the Central American Economic Council, in order to promote recovery and supervision of the economics of the region and of the Central American Common Market.

12. Undertake joint *démarches* to international specialized agencies, especially in the fields of employment, food and health, with the view to setting up special programmes for the region.

13. Officially constitute the Central American Monetary Council, undertaking to adopt the measures necessary to do so.

14. Support at the highest level the efforts by CADESCA, jointly and in co-ordination with subregional bodies, to obtain from the international community the resources necessary for Central America's economic reactivation.

15. Urge the countries which have expressed support for the efforts of the Contadora Group to manifest the support by increased flows of financing on an urgent basis so that Central America may obtain the resources necessary to begin to reactivate its intra-regional trade. In that field, as well as any other which contributes to the economic and social development of the region, CADESCA shall lend its full support within the framework of its functions and programmes.

16. With the co-operation of the ILO, apply international labour standards and conform their domestic legislation thereto, particularly in those areas which contribute to the reconstruction of Central American Societies and economics. Likewise, with the ILO's co-operation, implement programmes for creation of

new jobs, training of workers and use of appropriate technologies aimed at better utilization of the labour force and natural resources of each country.

17. Request the Pan American Health Organization and UNICEF, as well as other development agencies and the international financial community to support the financing of the "Plan of Priority Health Needs of Central America and Panama" approved by the Ministers of Health of the Central American Isthmus meeting in San José, on March 16, 1984.

Section 2. Recommendations on refugee matters

The Parties adopt the following recommendations:

18. That consultative machinery be established between Central American countries and representatives of the government offices in charge of the refugee problem in each State.

19. Support the work of the UNHCR in Central America, and establish direct means of co-ordination in order to facilitate its efforts to carry out its mandate.

20. That any repatriation of refugees be voluntary, on the basis of expressed individual wishes, and undertaken with the co-operation of the UNHCR.

21. That tripartite commissions composed of representatives of the sending State, the receiving State and the UNHCR be set up in order to facilitate repatriation of refugees.

22. Strengthen programmes of assistance and protection for refugees, especially in the fields of health, education, employment and security.

23. That programmes and projects be set up with a view to permitting the refugees to achieve self-sufficiency.

24. That the UNHCR or other international agencies be asked to help to train officials in each country responsible for providing protection and assistance to refugees.

25. That the international community be asked to provide immediate assistance to Central American refugees, both directly, through bilateral or multilateral agreements, and through the UNHCR and other agencies.

26. With the assistance of the UNHCR, identify other possible receiving countries for Central American refugees. In no case shall a refugee be transferred to a third country against his will.

27. That the governments of the region take the necessary steps to eradicate the causes giving rise to the refugee problem.

28. That once the bases for voluntary or individual repatriation have been agreed, with full guarantees for the refugees, the receiving countries allow official delegations from the sending countries, accompanied by representatives of the UNHCR and the receiving country, to visit the refugee camps.

29. That receiving countries in co-ordination with the UNHCR, facilitate the arrangements for the exit of refugees in cases of voluntary and individual repatriation.

30. Establish control measures in countries granting refuge in order to prevent refugees from participating in activities against the sending country, always with due respect for the human rights of refugees.

Part III

Commitments Relating to Verification and Control

The Parties shall undertake to:

1. Create, in common agreement with the member countries of the Contadora Group, a Verification and Control Commission for the commitments agreed to in this document.

2. The Commission shall be composed of the following:

(a) Four commissioners representing States recognized to be impartial and to have a genuine interest in contributing to the solution of the Central American crisis. They shall be nominated by the Contadora Group and approved by the parties having a voice and a vote on the decisions of the Commission. Co-ordination of the work of the Commission shall be rotated in accordance with the provisions of the bylaws;

(b) A Latin American Executive Secretary appointed by the Contadora Group in agreement with the parties having a voice and a vote on the decisions of the Commission. The Executive Secretary shall be responsible for the permanent operation of the Commission;

(c) A representative of the United Nations Secretary-General and a representative of the OAS Secretary General, acting as observers.

3. The Commission shall be established within sixty (60) days from the signature of this Act.

4. Once established, the Commission shall draw up its own bylaws.

5. The Verification and Control Commission shall be a permanent and autonomous body.

6. The Commission shall have three sections:

(a) A Security Affairs Section;
(b) A Political Affairs Section;
(c) An Economic and Social Affairs Section.

7. Each section shall have a Technical Secretary designated by the Commission members who shall be responsible for the operation of the section.

8. The sections will co-operate with the Commissioners in the verification and control of the various commitments agreed to in this document in conformity with the guidelines issued by the Commission.

9. The sections shall operate according to the following common rules and procedures:

(a) They shall receive co-operation and assistance from the Parties in carrying out their duties.

(b) They shall ensure the confidentiality of information gathered in the course of investigations.

(c) They shall submit periodic reports of their activities to the Commission so that it can transmit them to the Ministers of Foreign Affairs of the Central American countries and the Contadora Group States.

(d) They shall make recommendations to the Commission for the adoption of its decisions.

10. The Security Affairs Section shall be composed of the Commissioners and the Executive Secretary and, in carrying out its activities, it shall be assisted by

the appropriate Technical Secretary and advisers designated by each one of the Parties. Its duties shall be:

(a) Receive the current arms, installations and manpower inventories from the Central American States, prepared in accordance with the provisions of Annex A.

(b) Conduct technical studies to be used in establishing military strength limits for the States of the region in accordance with the basic criteria established in Annex B.

(c) Verify that no new arms are introduced that may qualitatively or quantitatively change present inventories and that no weapons banned by this Act are utilized.

(d) Establish a register of all commercial transfers of arms by States in the region, including donations and other transactions arranged under military assistance agreements with other governments.

(e) Verify the dismantling of foreign military installations as established in this Act.

(f) Receive the roster of foreign military advisers and verify their withdrawal according to the agreed timetable.

(g) Verify compliance with this Act concerning trafficking in arms and examine any reports of violations.

(h) Verify compliance with this Act concerning irregular forces and non-use of their own territories for destabilizing activities against any other State and examine any reports of violations.

(i) Verify compliance with the notification procedures for national or joint military manœuvres stipulated in this Act.

11. The section on Security Affairs shall operate in accordance with the following rules and procedures. It shall:

(a) Receive any report of violations of the commitments relating to security undertaken in this Act, provided that it is duly founded. It shall inform the Parties involved of the report and shall initiate whatever investigations it deems appropriate.

(b) Conduct its investigations through on-site inspection, compiling evidence and any other procedure it considers necessary for the performance of its functions.

(c) In cases of reports of violations of commitments relating to security affairs undertaken in this Act, prepare a report that the Parties involved shall undertake to accept. This report shall also be communicated to the Ministers of Foreign Relations of the Central American countries and to the Contadora Group for purposes of final provisions 4 and 5 of Part III of this Act.

12. The Political Affairs Section shall be composed of the commissioners and the Executive Secretary and shall perform its functions with the support of the Technical Secretary and persons of recognized competence and impartiality nominated by the States members of the Contadora Group and approved by the Parties. In the performance of its functions, the section shall:

(a) Receive and evaluate reports by the Parties concerning the manner in which they proceed to comply with the commitments relating to national reconciliation, human rights and electoral processes.

(b) Receive any reports concerning violations of the commitments relating to political affairs undertaken in this Act, provided that it is duly founded. It shall inform the Parties involved of the reports and shall initiate whatever investigations it deems appropriate.

(c) In cases of reports of violations of commitments relating to political affairs undertaken in this Act, prepare a report that the Parties involved shall undertake to accept. This report shall also be communicated to the Ministers of Foreign Relations of the Central American countries and to the States members of the Contadora Group for purposes of final provisions 4 and 5 of Part IV of this Act.

(d) Participate in observing the electoral processes conducted in each of the Parties.

13. The Economic and Social Affairs Section shall be composed of the Commissioners and the Executive Secretary and shall carry out its activities with the support of the Technical Secretary and a group of advisers consisting of a representative of each of the following organizations: ECLA, SIECA, CADESCA, UNHCR, CABEI and the Central American Monetary Council.

In the performance of its functions, it shall:

(a) Receive the reports by the Parties concerning their progress in complying with the economic and social commitments.

(b) Conduct an annual evaluation of advances in compliance with economic and social commitments, relying on the information furnished by the Parties and the competent international and regional organizations.

(c) Submit proposals in its annual report to strengthen regional co-operation and promote regional development plans, with particular emphasis on the aspects mentioned in the commitments in this Act, and call attention to non-compliance with the aforementioned commitments.

(d) The reports and studies prepared by the section shall be communicated to the Ministers of Foreign Relations of the Central American countries and the States members of the Contadora Group.

Final Provisions:

1. The commitments undertaken by the Parties in this Act shall be legal in nature and, therefore, binding. These commitments shall enter into force on the date of signature of this Act.

2. As of the date of signature of this Act, the Parties shall make every effort to implement the recommendations contained therein and shall attempt to co-operate among themselves to this end.

3. The Parties shall adjust their respective policies to conform to the letter and spirit of the whereas clauses of the Preamble to this Act.

4. Any problem or dispute concerning the implementation of the legal commitments contained in this Act that cannot be resolved by the Verification and Control Commission as established in Part III of this Act shall be submitted for consideration by the Ministers of Foreign Relations of the Parties and the members of the Contadora Group or their high-level representatives. To this end they shall meet at the petition of any of the Parties or the Commission.

5. The Ministers of Foreign Relations of the States members of the Contadora Group shall use their good offices to enable the parties concerned to resolve the specific situation submitted for their consideration. If that recourse fails, they may suggest another peaceful means of resolving the dispute in conformity with Article 33 of the United Nations Charter.

6. The Ministers of Foreign Relations of the States members of the Contadora Group shall evaluate the measures taken by the Parties to implement the recommendations contained in this Act and shall suggest proposals they deem relevant.

7. This Act shall be deposited with the States members of the Contadora Group.

8. This Act shall be registered with the United Nations General Secretariat in conformity with Article 102 of the United Nations Charter.

Done in the Spanish language in nine original copies at the city of on , 1984.

For the Government of the Republic of Costa Rica
For the Government of the Republic of El Salvador
For the Government of the Republic of Guatemala
For the Government of the Republic of Honduras
For the Government of the Republic of Nicaragua

Witnesses

For the Government of Colombia
For the Government of Mexico
For the Government of Panama
For the Government of Venezuela.

Annex 97

BROADCAST, SAN JOSÉ RADIO RELOJ, COSTA RICA, 14 JULY 1984, AS TRANSCRIBED IN *FOREIGN BROADCAST INFORMATION SERVICE* (FBIS) (COSTA RICA), 16 JULY 1984; SAN SALVADOR RADIO CADENA, 28 JUNE 1984, AS TRANSCRIBED IN *FBIS*, 2 JULY 1984 (EL SALVADOR); *LA ESTRELLA DE PANAMA*, 27 JUNE 1984, AS REPRINTED IN *FBIS*, 28 JUNE 1984 (HONDURAS); PANAMA, ACAN, 4 JULY 1984, AS TRANSCRIBED IN *FBIS*, 5 JULY 1984 (GUATEMALA); MANAGUA, RADIO SANDINO NETWORK, 10 JULY 1984, AS TRANSCRIBED IN *FBIS*, 11 JULY 1984 (NICARAGUA); MANAGUA DOMESTIC SERVICE, 25 JULY 1984, AS TRANSCRIBED IN *FBIS*, 25 JULY 1984 (NICARAGUA)

[Not reproduced]

Annex 98

FSLN COMANDANTE HENRY RUIZ, *BARRICADA*, MANAGUA, 25 JULY 1984 (ENGLISH TRANSLATION PROVIDED)

[Not reproduced]

Annex 99

NOTIMEX, MEXICO CITY, 28 JUNE 1984, AS REPRINTED IN *FOREIGN BROADCAST INFORMATION SERVICE*, 2 JULY 1984

[Not reproduced]

Annex 100

"NICARAGUAN HAILS 'FLUID' TALKS WITH US ON SECURITY", *WASHINGTON POST*, 12 AUGUST 1984

[Not reproduced]

Annex 101

UNITED NATIONS SECURITY COUNCIL RESOLUTION 530 (1983), 19 MAY 1983

[See I, *Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, p. 275]*

Annex 102

COMMUNICATION TO THE REGISTRAR OF THE COURT FROM COSTA RICA, 18 APRIL 1984

[See I, *Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, pp. 305-306]*

Annex 103

COMMUNICATION TO THE REGISTRAR OF THE COURT FROM EL SALVADOR, 19 APRIL 1984

[See I, *Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, pp. 306-307]*

Annex 104

NOTE FROM HONDURAS TO THE SECRETARY-GENERAL OF THE UNITED NATIONS, 18 APRIL 1984

[See I, *Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, pp. 307-309]*

Annex 105

MINISTRY OF FOREIGN AFFAIRS OF GUATEMALA, PRESS RELEASE, 16 APRIL 1984

[See I, Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, p. 310]

Annex 106

MEMORANDUM OF JOHN FOSTER DULLES CONCERNING ACCEPTANCE BY THE UNITED STATES OF THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE, REPRINTED IN *COMPULSORY JURISDICTION, INTERNATIONAL COURT OF JUSTICE: HEARINGS BEFORE A SUBCOMMITTEE OF THE SENATE COMMITTEE ON FOREIGN RELATIONS ON S. RES. 196*, 79TH CONG., 2D SESS. (1946)

I

The United States, since its formation, has led in promoting a reign of law and justice as between nations. In order to continue that leadership, we should now accept the jurisdiction of the International Court of Justice. If the United States, which has the material power to impose its will widely in the world, agrees instead to submit to the impartial adjudication of its legal controversies, that will inaugurate a new and profoundly significant international advance. Conversely, failure to take that step would be interpreted as an election on our part to rely on power rather than reason.

The procedure relating to compulsory jurisdiction is set forth in Article 36 (2) of the Court Statute. It provides for a declaration recognizing as "compulsory", on a basis of reciprocity, the jurisdiction of the Court "in all legal disputes concerning: a. The interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation".

That declaration the United States ought now to make.

II

There are, however, certain matters which can usefully be clarified. This could be done by the terms of the declaration.

1. *Advisory opinions.* — The compulsory jurisdiction should presumably be limited to disputes which are actual cases between States, as distinct from disputes in relation to which advisory opinions may be sought.

> *Comment:* The jurisdiction of the Court comprises not only cases, but also matters as to which advisory opinions may be sought (Stat., Art. 36 (1)). Probably any declaration under Article 36 (2) applies only to actual cases or controversies between States. But this is not wholly free from doubt, as paragraph (2), instead of repeating the word "cases", speaks of "legal disputes" — a phrase which might comprehend differences of opinion between States as to some legal question subsequently submitted to the Court for advisory opinion. If this is not the understanding upon which the United States accepts compulsory jurisdiction, it would be preferable so to indicate in the declaration rather than leave the matter open to possible subsequent controversy.

2. *Reciprocity.* — Jurisdiction should be compulsory only when all of the other parties to the dispute have previously accepted the compulsory jurisdiction of the Court.

> *Comment:* The Court Statute embodies the principle of reciprocity. It provides for compulsory jurisdiction only "in relation to any other State accepting the same obligation" (Art. 36 (2)). Oftentimes, however, disputes, particularly under multilateral conventions, give rise to the same issue as against more than one other nation. Since the Court Statute uses the singular "any other State", it might be desirable to make clear that there is no compulsory obligation to submit to the Court merely because one of several parties to such dispute is similarly bound, the others not having bound themselves to become parties before the Court and, consequently, not being subject to the Charter provision (Art. 94) requiring members to comply with decisions of the Court in cases to which they are a party.

3. *International law.* — If the basic law of the case is not found in an existing treaty or convention, to which the United States is a party, there should be prior agreement as to what are the applicable principles of international law.

> *Comment:* The Statute, Article 36 (2) recognizes that the jurisdiction of the Court relates only to "legal" disputes. The clear intent is not to require nations to submit to either judicial legislation or to dictates of political expediency. Subdivisions a, c, and d of Article 36 (2), quoted above (interpretation of treaties; establishment of facts; and measure of damage), relate to matters susceptible of judicial determination. However, subdivision b refers to "any question of international law". Article 38 of the Statute goes on to recognize as international law not merely international conventions, but "international custom", "general principles of law recognized by civilized nations", and "the teachings of the most highly qualified publicists of the various nations". If the applicable rule of international law is so uncertain that resort must be had to alleged custom, teachings, etc., then the Court can scarcely avoid indulging in a large amount of judicial legislation or political expediency. The United States can properly refrain from subjecting itself to that.
>
> If a case falls under Article 36 (2) *(b)* and if the applicable legal principles are not ascertainable from a treaty or convention to which the United States is a party, they could be stipulated before the obligation arises to submit to the jurisdiction of the Court. That was the procedure followed in the case of the *Alabama* arbitration. Then the applicable law was so vague and uncertain that Great Britain and the United States first negotiated the Treaty of Washington (1871) to establish the "rules to be taken as applicable to the case".
>
> The suggested safeguard is the more appropriate because a majority of the judges of the Court are drawn from countries which are not common law countries, but which depend almost wholly on written laws and decrees. Therefore, such judges can hardly be expected to be adept in the proper use of common-law methods.

4. *Domestic jurisdiction.* — Compulsory jurisdiction of the Court should not extend to matters which are essentially within the domestic jurisdiction of the United States.

> *Comment:* Article 2 (7) of the Charter, among other things, provides, in substance, that nothing contained in the present Charter shall require the Members to submit to settlement under the Charter matters which are essentially within the domestic jurisdiction of any State. The declaration under the Statute should preserve, and not seem to waive, that limitation.
>
> If condition 3 *(supra)* is expressed in the declaration that would make it

> unnecessary to stipulate who decides what is domestic, for that condition would prevent encroachment on domestic jurisdiction by an alleged unwritten growth of international law not recognized by the United States.

5. *Other tribunals.* — Compulsory jurisdiction of the Court should not extend to disputes the solution of which may be entrusted to other tribunals.

> *Comment:* Article 95 of the Charter expressly provides that Members may entrust the solution of their differences to tribunals other than the International Court of Justice. This right should be reserved. It may be that disputes between members of the Pan American Union could preferably be subjected to hemispheric procedures. Also, any treaty with reference to the establishment of an atomic development authority may provide for a special body, to adjudicate summarily certain types of disputes.

6. *Time-limit.* — Compulsory jurisdiction should, initially, be for a limited period only, say, 5 years, with a right thereafter to terminate on reasonable notice, say, 6 months.

> *Comment:* Article 36 (3) of the Court Statute expressly provides that the declaration accepting compulsory jurisdiction may be "for a certain time". It seems desirable to avail of this privilege. The Court and its personnel are new. Its judicial temperament and ability are still to be tested. If the United States accepts compulsory jurisdiction for a trial period only, that will not merely serve, negatively, to protect the United States; it will, affirmatively, provide an incentive to assure that the composition and functioning of the Court will increasingly inspire confidence in its high judicial quality.

III

The foregoing analysis may leave the impression that the proposed acceptance of the compulsory jurisdiction of the International Court of Justice is but a short and tentative step along the path to a rule of law. It is true that that path is as yet so untried that it would be reckless to proceed precipitately. The Court has yet to win the confidence of the world community. Furthermore, courts are designed to apply law, not make it, and international law has not yet developed the scope and definiteness necessary to permit international disputes generally to be resolved by judicial rather than political tests. There is nothing permanent about these limiting factors. There is good ground to hope that the Court will quickly demonstrate the judicial qualifications and temperament necessary to encourage nations to enlarge their use of the Court. The General Assembly of the United Nations will presumably carry out its mandate to encourage the progressive development of international law and its codification (Charter, Art. 13 (1) *(a)*). Such developments, which no nation can single-handedly assure, are essential to the creation of a world of law and justice. As those developments occur the initial step which the United States now takes, in itself of profound moral significance, will assume greatly increased practical significance.

Respectfully submitted.

July 10, 1946.

(Signed) John Foster DULLES.

Annex 107

REPORT OF THE SENATE FOREIGN RELATIONS COMMITTEE, NO. 1835, 79TH CONG., 2D SESS. (1946)

[See I, Exhibits Submitted by the United States of America in Connection with the Oral Procedure on the Request for the Indication of Provisional Measures, pp. 310-321]

Annex 108

NOTE FROM THE GOVERNMENT OF THE UNITED STATES TO THE SECRETARY-GENERAL OF THE UNITED NATIONS, 6 APRIL 1984

[See I, Nicaragua Memorial, Annex II, Exhibit B]

Annex 109

UNITED STATES DEPARTMENT OF STATE, DEPARTMENTAL STATEMENT, 8 APRIL 1984

[See I, Nicaragua Memorial, Annex II, Exhibit C]

Annex 110

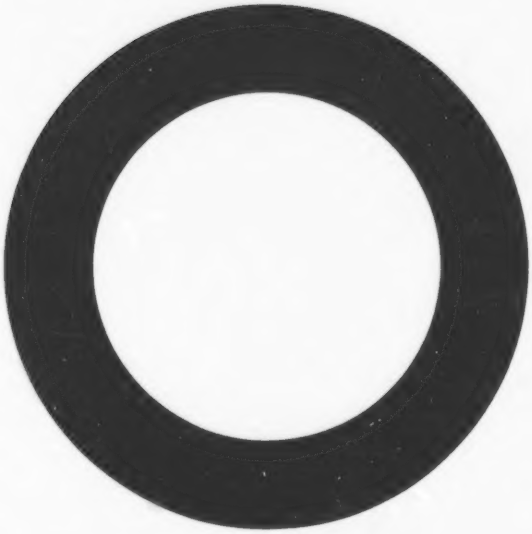
TRANSLATION OF NEWS REPORT IN *CRITICA* OF OBSERVATIONS BY FOREIGN MINISTER OYDEN ORTEGA DURAN OF PANAMA, 14 OCTOBER 1983

[Not reproduced]

Annex 111

CERTIFICATION

[Not reproduced]



DECLARATION OF INTERVENTION OF THE REPUBLIC OF EL SALVADOR

(Article 63 of the Statute)

DÉCLARATION D'INTERVENTION DE LA RÉPUBLIQUE D'EL SALVADOR

(Article 63 du Statut)

EMBASSY OF EL SALVADOR

15 August 1984.

I. I have the honour to refer to the Application of 9 April 1984 filed by the Republic of Nicaragua against the United States of America.

The Government of Nicaragua, in a malicious and improper fashion, has assured the Court that El Salvador does not consider itself the object of armed attack from Nicaragua. In view of these false allegations, the Republic of El Salvador has no alternative but to participate in the proceedings resulting from Nicaragua's Application of 9 April 1984.

Pursuant to Article 63 of the Statute of the Court and Article 82 of the Rules of Court, the Republic of El Salvador hereby intervenes by right in the current phase of the proceedings resulting from Nicaragua's Application of 9 April 1984. El Salvador makes this intervention for the sole and limited purpose of arguing that this Court does not have jurisdiction over Nicaragua's Application or the claims set forth therein, that for multiple reasons the Court should declare itself unable to proceed concerning such Application and claims, and that such Application and claims are inadmissible.

El Salvador also wishes to participate in order to make it a matter of record that contrary to what Nicaragua has asserted in its allegations in this case, El Salvador considers itself under the pressure of an effective armed attack on the part of Nicaragua and feels threatened in its territorial integrity, in its sovereignty, and in its independence, along with the other Central American countries. This is proved by the protests which Central American countries have made against the Nicaraguan Government. In view of the political use which Nicaragua has attempted to make of the International Court of Justice in its application before the Court, El Salvador comes here to affirm before the International Court of Justice and before the entire world, the aggression of which it is a victim through subversion that is directed by Nicaragua, and that endangers the stability of the entire region.

II. In 1979, each day it became more apparent that the Somoza Government was collapsing and a new force, ostensibly dedicated to reform and progress, would eventually assume power in the brother country of Nicaragua. For that reason, many of us in El Salvador looked with hope at our neighbour Nicaragua during the spring and summer of 1979. When that moment arrived, we, along with many other countries, were very pleased when the Sandinistas promised to the Organization of American States, in July 1979, that their goals for Nicaragua were peaceful and democratic. Indeed, our hopes for a new era of democracy, progress, reform, and an end to every form of repression in Central America were manifested in the same year when our country also adopted a programme of progress in accordance with popular ideals.

III. However, our hopes and expectations for a new era of peace and progress were frustrated, for very soon it became clear that Nicaragua had deceived its people, Central America, and the democratic world.

In place of peace, the Sandinista Government of Nicaragua opted for aggression. Nicaragua has become converted into an armed camp whose military forces are completely out of proportion to its strict and legitimate security requirements.

Moreover, especially for the Salvadorians, Nicaragua has been converted into a base from which the terrorists seek the overthrow of the popularly elected Government of our nation. They are directed, armed, supplied, and trained by Nicaragua to destroy the economy, create social destabilization, and to keep the people terrorized and under armed attack by subversives directed and headquartered in Nicaragua. Despite all of these interventions by Nicaragua, the Government of El Salvador has not wanted to present any accusation or allegation to any of the jurisdictions to which we have a right to apply because we were seeking, and we continue to seek, a solution of understanding and mutual respect between the two nations, despite the fact that Nicaragua has on many occasions used international fora to attack and denigrate its neighbours, and especially El Salvador.

On the other hand, our nation cannot, and must not, remain indifferent in the face of this manifest aggression and violent destabilization of the Salvadorian society which oblige the State and the Government to legitimately defend themselves. For that reason we have sought and continue to seek assistance from the United States of America and from other democratic nations of the world; we need that assistance both to defend ourselves from this foreign aggression that supports subversive terrorism in El Salvador, and to alleviate and repair the economic damage that this conflict had created for us.

IV. The reality is that we are the victims of aggression and armed attack from Nicaragua and have been since at least 1980. Moreover, even before the Sandinistas assumed power in Nicaragua in July 1979, Nicaraguans and Cubans were involved with the subversive groups in El Salvador, and used them for the guerrilla warfare in Nicaragua in order to take and consolidate Sandinista power.

V. Nicaraguan and Cuban officials work directly with Salvadorian guerrillas, through the "Comision Militar", to channel Nicaraguan military support to the Farabundo Marti National Liberation Front (FMLN). The "Comision Militar" is under the control of the Minister of Defence, Humberto Ortega Saavedra, and Sandinista Army Chief of Staff Joaquín Cuadra. The general headquarters of the FMLN near Managua is the command centre which directs guerrilla operations and co-ordinates the logistical support, including the provision of munitions, clothes and money. As our former President, Alvaro Magana, said in a press conference in December 1983: "... Nicaragua is the launching pad for armed subversion in El Salvador."

VI. The facts concerning the deaths, which occurred in April 1983 in Managua, of the two Salvadorian subversive leaders, Melida Anaya Montes and Cayetano Carpio, confirmed once again the presence of the subversive leadership of the FMLN in Nicaragua, and demonstrated their close ties with the Sandinista leadership. In addition, Nicaragua provides houses and hideouts to the subversives of the FMLN, and communications facilities of the same group are located in northwest Nicaragua. These facilities are used to pass instructions and messages to subversive units in El Salvador.

VII. In addition to the entire terrorist training operation established in Cuba, since mid-1980 the Sandinista National Liberation Front has made available to the Salvadorian guerrillas training sites in Nicaraguan territory. The training includes small-unit tactics, experience with firearms and explosives, etc. These training centres, managed by Cuban and Nicaraguan military personnel, have been identified and located in El Paraiso, Jocote Dulce, Bosques de Jilao, and at Kilometre 14 on the South Highway. The first two locations are situated in the southern suburbs of Managua; the second two are outside the city.

(A) One Salvadorian subversive, who deserted to Honduras in September

1981, reported that he and 12 other personnel went from Nicaragua to Cuba for intensive military training, where over 900 Salvadorians were then receiving training.

(B) Several subversives captured in a raid in Tegucigalpa, Honduras, in November 1981, told Honduran authorities that the Nicaraguan Government had provided them with funds for their travel and with explosives for use in El Salvador.

(C) In March 1983, Honduran security officials surprised a group of Salvadorian subversives travelling across Honduras from El Salvador and on to training camps in Nicaragua, which proves that there are land infiltration routes between Nicaragua and El Salvador.

VIII. A blatant form of Nicaraguan aggression against El Salvador is the Sandinista involvement in supply operations for the FMLN subversives. Although the quantities of arms and supplies, and the routes used, vary, there has been a continuing flow of arms, ammunition, medicines, and clothing from Nicaragua to our country.

(A) Clandestine deliveries of arms and munitions by air and by sea are sent from Cuba to El Salvador by way of Nicaragua, where they are stored pending their final delivery to the Salvadorian subversives. Such warehouses have been specifically identified and located in Managua.

(B) Direct supply flights were made from Nicaragua, for the purpose of supporting the insurgents, during the January 1981 final offensive, which was designed to overthrow the government of our country.

(C) The weapons intercepted in Honduras have been identified as originating from weapons supplied to United States units in Viet Nam. Documents we have captured from subversives operating in our country indicate that they, with the assistance of the Governments of Nicaragua and Cuba, have negotiated arms supply agreements with Viet Nam and other Communist countries, designating Nicaragua as the vehicle and medium for delivery.

A leader of the Armed Forces of National Resistance (FARN), captured by our regular forces in August 1982, stated that the Nicaraguans were delivering to the subversives weapons provided by Viet Nam to Nicaragua, and confirmed other aspects of the support provided by the Sandinista National Liberation Front to the subversives.

(D) We have positive proof of the use of FAL rifles and the munitions manufactured in Venezuela, which were delivered, during the administration of President Carlos Andres Perez, to the Sandinista guerrillas who were fighting against Somoza. All these arms have been passed on by the Sandinista Government to the Salvadorian subversives.

(E) Another subversive commander, captured in Honduras in August 1982, confirmed that Nicaragua is the major supplier of arms and munitions to the insurgents. One of his comrades had personally obtained arms from Nicaragua on five occasions in that same year.

(F) Arms and munitions, including heavy weapons, are also provided to the subversives not only by land, but also by air and by sea from Nicaragua. These weapons and other materiel are brought by sea across the Gulf of Fonseca from Nicaragua to our territory.

The weapons, munitions, and stores are transported by sea in fishing vessels, and by small craft (called cayucos) which are powered by small outboard motors and have limited fuel supplies, which proves conclusively that these supplies do not come from distant ports and that the short range of these vessels does not extend beyond Nicaraguan territory. For this reason, all of the supply points are located on the beaches of south-east El Salvador.

(G) In May of this year, our Armed Forces destroyed a subversive camp which was an important element of the supply route, capturing approximately 30 transport trucks, and maps showing these supply routes.

(H) In late 1983 a United States reporter named Sam Dillon visited a small Nicaraguan port, called La Concha, located about 60 kilometres across the Gulf of Fonseca from El Salvador. Mr. Dillon reported that the residents of the so-called "Fishing Co-operative" had — as traditional smugglers — introduced since 1979 large quantities of weapons into El Salvador, under instructions of the Nicaraguan Government.

(I) Seventy-three per cent of the 214 M-16 rifles captured on 21 July 1984, from FMLN subversives, by the Salvadorian Armed Forces were originally delivered by the United States to Viet Nam. Documentation has recently been prepared showing the routes by which these weapons were transported from Viet Nam to Cuba, from Cuba to Managua, and from Managua to the FMLN, to El Salvador.

(J) The former official of Nicaraguan security, Miguel Bolanos, has stated that small aircraft have been used to transport materiel and armaments from Nicaragua.

(K) The presence of aircraft from Nicaragua increases noticeably before the launching of large-scale subversive operations.

IX. Nicaraguan officials have publicly admitted their direct involvement in waging war on us. Foreign Minister Miguel D'Escoto, when pressed at a meeting of the Foreign Ministers of the Contadora Group in July 1983, by our Foreign Minister, Dr. Fidel Chavez Mena, on the issue of Nicaraguan materiel support for the subversion in El Salvador, shamelessly and openly admitted such support in front of his colleagues of the Contadora Group. That statement, made in those particular circumstances, is significant, inasmuch as the interventionist attitude of the Nicaraguan Government, in its eagerness to export subversion, not only manifests itself in relation to El Salvador, but also has had to do with countries such as Colombia, Costa Rica, Honduras and other Latin American countries, with some of which it has had serious problems. This is because Nicaragua, as Nicaragua has itself recognized officially, has been converted into the centre of exportation of revolution to all of the countries in the area.

The Marxist international intervention has been the subject of statements by numerous political leaders, both those of Nicaragua as well as those of other countries in the Marxist-Leninist revolutionary orbit: thus, the former Prime Minister of Grenada, Maurice Bishop, stated in a speech of 19 July 1980, during a ceremony commemorating the first anniversary of the Sandinista Revolution, that :

> ". . . now we can speak not only about a revolutionary Cuba, not only about a revolutionary Nicaragua, but also about a revolutionary El Salvador, a revolutionary Guatemala, and a revolutionary Honduras".

Moreover, Fidel Castro said :

> ". . . and we are certain that the Sandinista Revolution will teach us much, just as we are certain that its example will have extraordinary influence in the rest of Latin America".

On 5 October 1980, in San José, Rafael Cordova, one of the five members of the Sandinista Junta, declared that :

> ". . . if the left wins (in El Salvador), and we can do no less than crave that our Salvadorian comrades will win, Guatemala will fall immediately like a ripe fruit and in Nicaragua the Sandinista revolutionary process will become established".

X. The most positive proof of Nicaraguan intervention and participation in the subversive process against El Salvador was shown to the world the day of 10 January 1981, when the national radio of Nicaragua, Radio Sandino, was used for an entire day as an instrument of direct support, with harangues, instructions, and, under the pretence of giving the news, events were described before they occurred. This clearly demonstrates Nicaragua's participation in the planning of the offensive.

XI. The damage caused to the economy, to our infrastructure, and to the people of our country is immense and very difficult to calculate. The cost in human lives is alarming. As a result of the insurgency supported by the Sandinistas, we have approximately half a million persons internally displaced in our country and over 30,000 persons have been killed in the conflict since it was unleashed in 1979. The subversives, aided and abetted by their allies in Nicaragua, have destroyed farms, businesses, bridges, roads, dams, power sources, trains and buses. They have mined our roads in an attempt to disrupt our economy and with the purpose of preventing our citizens from participating effectively in the national elections. The total of the damages produced by the subversion to the Salvadorian economy since 1979 to the end of 1983 has been conservatively estimated to amount to approximately US$800 million.

XII. Faced with this aggression, we have been called upon to defend ourselves, but our own economic and military capability is not sufficient to face any international apparatus that has unlimited resources at its disposal, and we have, therefore, requested support and assistance from abroad. It is our natural, inherent right under Article 51 of the Charter of the United Nations to have recourse to individual and collective acts of self-defence. It was with this in mind that President Duarte, during a recent visit to the United States and in discussions with United States Congressmen, reiterated the importance of this assistance for our defence from the United States and the democratic nations of the world.

This was also done by the Revolutionary Junta of Government and the Government of President Magana.

XIII. Despite all of the foregoing, the Government of El Salvador has always sought peaceful co-existence with its neighbours. Indeed, President Duarte was prepared to send a high-level delegation, represented by the Deputy Foreign Minister of the Republic, to the recent fifth anniversary celebrations of the popular Sandinista Revolution. This gesture of friendship was responded to by a public statement by the Nicaraguan Chief of State and Co-ordinator of the Sandinista Junta, Daniel Ortega, during a recent interview by German television. He publicly stated that: "... he could meet with President Duarte, but that would not impede the fact of continuing support to the Salvadorian guerrillas". In the face of such a declaration of hostility, the Government had no other alternative but to cancel the visit to the Nicaraguan ceremony. Furthermore, it considers that these statements by Mr. Ortega involve a self-confession of intervention and that they state the official position in that regard of the Government of Nicaragua, inasmuch as they come directly from the Chief of State of Nicaragua.

The Chief of State of Nicaragua himself recognizes and confesses to that country's intervention in the internal affairs of El Salvador.

The Nicaraguan Government never explained or apologized for Ortega's public statement regarding support to the FMLN. And certainly, up to this moment, Nicaragua continues to be the principal source of material assistance to the subversives (munitions, arms, medical supplies, training, etc.) in preparation for the expected general summer offensive, predicted by the very same FMLN.

In our opinion there are two levels of jurisdictional competence to settle conflicts of an international nature; one is eminently political and the other is legal or juridical.

XIV. Nicaragua has availed itself in this case of the second of the systems. Nicaragua bases its jurisdictional claim on Article 36 of the Statute of the Court in the introduction of its Application, paragraph 13. Nicaragua founds its principal claim against the United States on supposed violations of the Charter of the United Nations, the Charter of the Organization of American States, the Convention on Rights and Duties of States, and the Convention Relative to the Duties and Rights of States in the Event of Civil Strife. The pretension of Nicaragua is that the United States is involved in the use of armed force against Nicaragua in violation of pertinent provisions of those multilateral treaties or conventions.

Assuming *arguendo* the supposed validity of Nicaragua's jurisdictional allegation, El Salvador also is a party to the Statute of the International Court, having become so when it signed and ratified its participation in the Charter of the United Nations. El Salvador became a member of the Charter on the same date. It became a member of the Organization of American States and ratified that Convention on 16 June 1950. It became a member of the Convention Relative to the Duties and Rights of States in the Event of Civil Strife and ratified it on 25 April 1936. It ratified the Convention on Rights and Duties of States on 25 April 1936. Therefore, El Salvador is party to all the multilateral conventions on which Nicaragua alleges the jurisdictional basis of its substantive claims.

These treaties give to El Salvador equally the right to demand that Nicaragua cease in its overt intervention in our internal affairs, and El Salvador considers, and this is a reason for intervening in the case of *Nicaragua* v. *the United States*, that all these multilateral treaties and conventions constitute the lawful mechanisms for the resolution of conflicts, having priority over the assumption of jurisdiction by the International Court of Justice. This position has been maintained by the Republic of El Salvador on other occasions, accepting the jurisdiction of the Organization of American States, for example, in the conflict which we had with Honduras in 1969. On that occasion there was a resolution and El Salvador respected that resolution. The spirit of that acceptance, which involved a manifestation of our jurisdictional reservation with respect to the Court at The Hague, was precisely to respect the jurisdictional supremacy of multilateral conventions.

In the opinion of El Salvador, therefore, it is not possible for the Court to adjudicate Nicaragua's claims against the United States without determining the legitimacy or the legality of any armed action in which Nicaragua claims the United States has engaged and, hence, without determining the rights of El Salvador and the United States to engage in collective actions of legitimate defence. Nicaragua's claims against the United States are directly interrelated with El Salvador's claims against Nicaragua.

Moreover, the Application of Nicaragua is inadmissible inasmuch as it is based on a fallacy, which is to say that El Salvador is not being affected by Nicaragua's actions in exporting subversion.

Any case against the United States based on the aid provided by that nation at El Salvador's express request, in order to exercise the legitimate act of self-defence, cannot be carried out without involving some adjudication, acknowledgment, or attribution of the rights which any nation has under Article 51 of the United Nations Charter to act collectively in legitimate defence. This makes inadmissible jurisdictional action by the Court in the absence of the participation of Central America and specifically El Salvador, in whose absence the Court lacks jurisdiction.

Finally, El Salvador points to the fact that it has entered a reservation concerning acceptance of the Court's jurisdiction, with specific reference to disputes relating to facts or situations involving hostilities, armed conflicts, individual or collective acts of legitimate defence, resistance to aggression, fulfilment of obligations imposed by international organizations, and other similar acts, measures, or situations in which El Salvador is, has been, or might be an involved party.

The other instance or level of jurisdiction to which we have made reference is the political one.

XV. The current world situation suggests that, in addition to bilateral disputes, multinational conflicts have arisen which traditional juridical mechanisms are inadequate to resolve, and new means of multilateral political dialogue are being sought that would consider political, military, economic, and international factors as well as legal factors. This can be said of the conflicts in Asia Minor; it applies more acutely to those between various nations of the Middle East; and it is specifically true of the Central American conflict.

In this sense El Salvador states that in its view everyone has acknowledged that the Central American phenomenon has moved beyond the scope of simple bilateral treatment and has become a regional issue entailing the participation of multilateral interests. In this case it is clear that competent bodies such as the United Nations Security Council and General Assembly and the Thirteenth Meeting of Foreign Ministers of the Organization of American States have had to defer to a new instrument of good offices.

(A) It is in line with this concept that four Western Hemisphere countries — Mexico, Colombia, Venezuela and Panama — took an initiative and created the instrument to deal with this crisis, which, as is well known, is called the Contadora process. The five Central American countries — Guatemala, Honduras, Costa Rica, El Salvador and Nicaragua — have accepted that political initiative to settle the conflicts of the Central American crisis, which, it must not be overlooked, involves other countries such as Cuba, Russia and the United States itself.

(B) It should be recalled that all parties of this group have accepted the 21 points of Contadora and the other structural documents of the process, in which is contemplated a solution by political consensus of each and every one of the claims presented by Nicaragua before the International Court of Justice, as well as the claims of the other Central American nations against Nicaragua. This argument would suffice to deem jurisdictional action by the Court inappropriate, for it would fundamentally undermine the negotiations currently being carried out within the Contadora process.

This process has been specifically endorsed by the Security Council of the United Nations and by the Organization of American States, and has thus far enjoyed public support from practically all of the nations of the world, to such an extent that next September a meeting will be held of the four Contadora countries, the five Central American countries, and the ten foreign ministers representing the European Economic Community, as well as Spain and Portugal, within the general context of the framework established by Contadora.

(C) El Salvador considers that it would be very harmful and inappropriate for the Court to consider the Nicaraguan Application, for to do so would entail transferring the forum from the political forum, which is one of understanding and tolerance, to the forum of legal confrontation, which has other mechanisms and other means of solution.

(D) It would also set a precedent on the basis of which all other nations participating in the Central American conflict would have to resort to that coerced judicial jurisdiction which would give rise to multiple litigation with ramifications which go beyond strictly juridical frameworks.

XVI. In this intervention, presented by El Salvador on the basis of Article 63 of the Statute of the Court and Article 82 of the Rules of Court, El Salvador places on record its valid points of view regarding the interventionist attitude of Nicaragua and regarding the Court's lack of jurisdiction over this case and its inadmissibility. El Salvador reserves its other rights under the Statute of the Court and the Rules of Court to make its views known and to assert its interests, including the right to file written pleadings in support of El Salvador's intervention in this case.

In the name and on behalf of
the State of El Salvador,

(Signed) Ivo P. ALVARENGA,

Ambassador Extraordinary and Plenipotentiary,
Agent to the International Court of Justice.

AFFIDAVIT

MINISTRY OF FOREIGN RELATIONS
EL SALVADOR

I, Ricardo Acevedo Peralta, declare and certify the following:

1. I am Acting Minister of Foreign Affairs of the Republic of El Salvador. My official duties include participation in international matters which may affect El Salvador. My responsibilities also concern the conduct of relations between El Salvador and other countries, including the United States of America and the Republic of Nicaragua.

2. The statements in our Declaration relative to the proceeding pending before this Honourable Court between Nicaragua and the United States of America are true to the best of my knowledge. In the performance of my functions, I have followed closely events related to the referenced case through documents obtained through official channels.

3. The facts relative to the complaints against Nicaragua I deem to be true, based upon official information from our ministries and organizations dealing with defence. Therefore I affirm that the facts contained in our Declaration are true to my best understanding.

(Signed) Ricardo ACEVEDO PERALTA,
Acting Minister of Foreign Affairs
of the Republic of El Salvador.

I certify that the above is a true and accurate translation of the affidavit executed in Spanish by Acting Foreign Minister Acevedo.

(Signed) Ivo P. ALVARENGA,
Agent of the Republic of El Salvador.

LETTER FROM THE AMBASSADOR OF EL SALVADOR TO THE REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE

10 September 1984.

Re: Declaration of Intervention of the Republic of El Salvador.

I have the honour to refer to the Declaration of Intervention of my Government filed under Article 63 of the Statute of the International Court of Justice, and to the communiqué of the Registrar of 16 August 1984 noting that the time-limits for the observations of the United States and Nicaragua regarding this Declaration of Intervention had been fixed for 14 September 1984.

I. The Admissibility of El Salvador's Declaration of Intervention in the Pending Proceedings on Jurisdiction

1. The construction of international conventions to which El Salvador is a party is centrally involved in the Court's forthcoming consideration of the jurisdiction of the Court and of the admissibility of Nicaragua's Application. El Salvador asserts its automatic right to intervene in this phase or stage of the proceedings in order to address the threshold questions of the construction of Article 36 of the Statute of the Court, and correlatively the construction of the relevant provisions of the Charter of the United Nations, in particular Articles 39, 51 and 52. El Salvador is a party to both these conventions, as set forth in its Declaration. El Salvador will contend that those provisions should be construed to deny the jurisdiction of the Court to consider and apply the conventional principles of international law relied on by Nicaragua to an ongoing armed conflict such as is presently underway in Central America, and will contend that the Application of Nicaragua is inadmissible by a process of similar reasoning. El Salvador will particularly contend that this construction is appropriate with respect to Articles 39, 51 and 52 of the Charter, *inter alia*, and to Article 36 of the Statute, because :

— these provisions, properly construed, contemplate that the application of the principles on which Nicaragua relies to an ongoing armed conflict is a political, not a judicial question, and that the exclusive appropriate fora for consideration of the search for peace in ongoing armed conflict is through the established processes of the political organs of the international system;

— these conventional provisions properly construed deny jurisdiction to the Court with respect to an ongoing armed conflict, make clear that nothing in the Charter including the actions of the Court under the Statute shall affect the right of individual or collective self-defence and make clear that such armed conflict is not a legal dispute within the competence of the Court; and

— that those provisions properly construed make the States of Central America indispensable parties to any proceeding concerned with the ongoing Central American conflict, and since these States are not parties to the proceeding it cannot go forward.

2. These are the provisions of the conventions to which El Salvador is party whose construction is involved and at issue in the present or jurisdictional phase or stage of the proceeding, whose proper construction El Salvador wishes to

address in the exercise of its automatic right as a party to those conventions to intervene. In this respect, El Salvador's Declaration of Intervention does not presuppose that the Court has jurisdiction or that the Nicaraguan Application is admissible. Rather, El Salvador seeks to address at the outset of the proceeding those threshold jurisdictional and admissibility issues as they should be construed under the relevant conventions to which El Salvador is a party.

3. El Salvador thus invokes its right to intervene in a way which strictly conforms to the conditions of Article 63. Its intervention is limited. It seeks to speak only to the construction of the conventions to which it is a party. Thus, it does not propose to address the question whether Nicaragua ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice, referred to in the Court's Order of 10 May 1984 (*Military and Paramilitary Activities*, p. 175, paras. 13 through 20). El Salvador may address the effectiveness of the declaration of the United States of 6 April 1984, under Article 36, paragraph 2, of the Statute, referred to in paragraphs 11 and 12 of the Order of 10 May 1984, only to the extent that the Court's determination of the question might affect the reservation of El Salvador to the Court's jurisdiction.

4. El Salvador recognizes, pursuant to Article 63 (2), that it will be equally bound by the convention construction given by the Court's judgment.

5. If the Court were to reject the dual contentions of El Salvador that the Court lacks jurisdiction and that the Application is inadmissible, then El Salvador reserves the right in a later substantive phase of the case to address the interpretation and application of the conventions to which it is also a party relevant to that phase, namely Article 2 (4) of the Charter, Articles 18 and 20 of the Charter of the Organization of American States, the Convention on the Rights and Duties of States and the Convention on the Rights and Duties of States in the Event of Civil Strife. El Salvador reserves the right to contend at that later phase for a construction of those conventions which avoids the impairment of its individual and collective right of self-defence.

II. The Procedure for Consideration of El Salvador's Declaration

6. If no Party objects on 14 September 1984 to El Salvador's Declaration, then El Salvador anticipates that the Court will promptly advise El Salvador that its Declaration is admitted and will make appropriate arrangements to provide El Salvador at the earliest convenience with the pleadings in the matter. I would also propose meeting during the week of 17 September with the President of the Court to consider the submission of El Salvador's written observations on the conventional interpretation questions relating to jurisdiction and admissibility.

7. If either Party objects on 14 September 1984 to El Salvador's Declaration, or if the Court requires further elaboration of El Salvador's or the Parties' views as to El Salvador's right, then the Court should convene an early hearing for that purpose.

8. El Salvador's Declaration of Intervention is of necessity based on a limited knowledge of the proceeding. The pleadings and documents have not yet been made accessible to the public under Article 53 (2) of the Rules. El Salvador therefore formally asks to be furnished with the pleadings and documents annexed as contemplated by Article 53 (1) of the Rules, at least in so far as those pleadings address the Parties' construction of Article 36, paragraphs 2 and 3, of the Statute and Articles 39, 51 and 52 of the Charter. Such access is necessary in order that El Salvador may take full advantage of its right to intervene under Article 63 of the Statute.

9. El Salvador further requests a reasonable period of time within which to

analyse the pleadings for purposes of determining how they bear on El Salvador's right to intervene and on the construction of those conventions which El Salvador will advance to the Court. El Salvador notes, of course, that in the *Haya de la Torre* case, Judgment (of 13 June 1951) *(I.C.J. Reports 1951)*, Cuba received the pleadings on 19 February 1951, three months before the hearing was held on Cuba's intervention on 15 May 1951, thus reflecting the need for an intervening State to be given adequate time to absorb the existing pleadings.

10. I request that this letter be circulated to the Members of the Court and considered by them as a part of the Declaration in amplification of the contents thereof.

In the name and on behalf of
the State of El Salvador

(Signed) Ivo P. ALVARENGA,
Ambassador,
Agent to the International Court of Justice.

WRITTEN OBSERVATIONS ON THE DECLARATION OF INTERVENTION

OBSERVATIONS ÉCRITES SUR LA DÉCLARATION D'INTERVENTION

LETTER FROM THE AGENT OF NICARAGUA TO THE REGISTRAR SUBMITTING THE OBSERVATIONS OF NICARAGUA ON THE DECLARATION OF INTERVENTION OF EL SALVADOR

The Hague, 10 September 1984.

I have the honour to refer to the letter from the Deputy Registrar of 15 August 1984.

In response to the invitation in the aforementioned letter, Nicaragua respectfully submits the following observations in relation to the Declaration of Intervention of the Republic of El Salvador in the above entitled case, filed 15 August 1984.

1. Nicaragua has no objection in principle to a proper intervention by El Salvador in this case in accordance with Article 63 of the Statute of the Court and Articles 82-85 of the Rules of Court. Nicaragua's Application, in addition to claims under general international law, asserts claims under certain conventions. It is well-established that any State may intervene as of right under Article 63 in a case involving the interpretation of a convention to which it is a party if it meets the requirements of the Article and the relevant Rules.

2. Although Nicaragua has no intention to oppose El Salvador's intervention, it feels bound to call the Court's attention to certain deficiencies, both as to form and substance, in the Declaration of Intervention.

3. As to form: The declaration purports to be made under Article 63 of the Statute of the Court. (That Article permits intervention by a State that is party to a convention the construction of which is in question in the case.) Article 82 of the Rules of Court, which governs interventions under Article 63, provides that a declaration of intervention

> "shall contain:
>
> . . .
>
> *(b)* identification of the particular provisions of the convention the construction of which [the declarant] considers to be in question;
>
> *(c)* a statement of the construction of those provisions for which it contends;
>
> . . ."

The Declaration of El Salvador contains no such "identification" and no such "statement".

4. The requirements of Article 82 of the Rules are not mere matters of form. They are necessary to ensure that the intervention falls properly within the provisions of Article 63 of the Statute, and to make clear what portions of the Court's judgment are binding on the intervenor in accordance with that Article.

5. As to substance: The Declaration states that El Salvador seeks to intervene for the sole and limited purpose of arguing that this Court does not have jurisdiction over Nicaragua's application of the claims set forth therein, that for multiple reasons the Court should declare itself unable to proceed concerning such application and claims, and that such application and claims are inadmissible.

To another point the Declaration states that El Salvador:

> "also wishes to participate in order to make it a matter of record that contrary to what Nicaragua has asserted in its allegations in this case, El Salvador considers itself under the pressure of an effective armed attack on the part of Nicaragua . . .".

Article 63 of the Statute, however, does not permit intervention for the purpose of opposing jurisdiction or to make things a "matter of record", but only for the purpose of the interpretation of an identified provision of a convention to which the intervenor is a party. This is the teaching of the Court's ruling on the Cuban Declaration of Intervention in the *Haya de la Torre* case, where the Court said:

> "the only point which it is necessary to ascertain is whether the object of the intervention of the Government of Cuba is in fact the interpretation of the Havana Convention . . .".

6. The Declaration includes a series of paragraphs alleging activities by Nicaragua that El Salvador terms an "armed attack". The Court should know that this is the first time El Salvador has asserted it is under armed attack from Nicaragua. None of these allegations, which are properly addressed to the merits phase of the case, is supported by proof or evidence of any kind. Nicaragua denies each and every one of them, and stands behind the affidavit of its Foreign Minister, Father Miguel d'Escoto Brockmann, in which the Foreign Minister affirms that the Government of Nicaragua has not supplied arms or other materials of war to groups fighting against the Government of El Salvador or provided financial support, training or training facilities to such groups or their members.

7. Nicaragua calls attention to Article 85 of the Rules of Court, which provides:

> "2. The time-limits fixed [for the submission of a written statement by the intervenor and for comments on that statement by the parties] shall, so far as possible, coincide with those already fixed for the pleadings in the case."

In Nicaragua's view, the prompt disposition of the present jurisdictional phase of the case and a speedy determination of the merits is a matter of utmost urgency. In agreeing in principle to the intervention of El Salvador, Nicaragua does so on the understanding that such intervention shall not become the occasion for delaying the proceedings.

(Signed) Carlos ARGÜELLO G.,
Agent of the Republic of Nicaragua.

LETTER FROM THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE SUBMITTING THE OBSERVATIONS OF THE UNITED STATES ON THE DECLARATION OF INTERVENTION OF EL SALVADOR

14 September 1984.

I have the honor to acknowledge the receipt of your letter of 15 August 1984 transmitting a certified copy of El Salvador's Declaration of Intervention pursuant to Article 63 of the Statute of the Court in the case between Nicaragua and the United States, and fixing 14 September 1984 as the final date for the filing of written observations on this Declaration of Intervention by the Parties. I have also received a copy of El Salvador's letter to the Registrar of 10 September 1984 concerning its intervention, as transmitted by your letter of the same date. Following are the observations of the United States with respect to El Salvador's Declaration of Intervention.

By virtue of the Court's Order of 14 May 1984, the current stage of proceedings in this case is confined to "the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the [Nicaraguan] Application . . .". Consistent with that Order, El Salvador seeks to intervene —

> "for the sole and limited purpose of arguing that this Court does not have jurisdiction over Nicaragua's Application or the claims set forth therein, . . . and that such application and claims are inadmissible". (Declaration of Intervention, p. 451, *supra.*)

Specifically, El Salvador seeks to intervene with respect to certain questions of construction of the Charter of the United Nations, in particular Articles 39, 51 and 52, and of the Statute of the Court, which forms a part of the Charter, in particular Article 36. In making this intervention, El Salvador relies on the fact that it is a party to the Charter of the United Nations and to the Statute of the Court and on the fact that the referenced questions of construction of the Statute and Charter are at issue in the current stage of proceedings. El Salvador's request is timely, in that it has been filed before the date fixed for the opening of the oral proceedings on these questions. (Article 82 (1), Rules of Court.)

In view of these circumstances, the United States is of the view that El Salvador has a right pursuant to Article 63 of the Statute of the Court to intervene at this stage of the proceedings.

1. El Salvador Has the Right to Intervene Pursuant to Article 63 of the Statute of the Court

Article 63 of the Statute of the Court provides that:

> "1. Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith.
>
> 2. Every State so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it."

This provision, apart from the paragraph numbering and punctuation, is identical to Article 63 of the Statute of the Permanent Court of International Justice, which in turn was based on similar articles in the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes. (This history is reviewed by Judge Oda in his dissenting opinion in *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application by Italy for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 3, at pp. 100-102 (diss. op. Oda).)

Article 63 gives each State the *right* to intervene in pending proceedings, provided that the case involves the construction of a convention and that the State seeking to intervene is a party to that convention. Thus M. de Lapradelle, Chairman of the Drafting Committee of the Advisory Committee of Jurists, explained the purpose of Article 63 in the Statute of the Permanent Court of International Justice as follows:

> "[T]here is one case in which the Court cannot refuse a request to be allowed to intervene; that is in questions concerning the interpretation of a Convention in which States, other than the contesting parties, have taken part; each of these is to have the right to intervene in the case." (Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16-July 14, 1920*, p. 746 (1920).)

Similarly, in its first judgment, the Permanent Court of International Justice recognized the right to intervene under Article 63:

> "[W]hen the object of the suit before the Court is the interpretation of an international convention, any State which is a party to this convention has, under Article 63 of the Statute, the right to intervene in the proceedings instituted by others . . ." (*S.S. "Wimbledon", Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 12.)

This early authority has been confirmed by the present Court. For example, in *Haya de la Torre* the Court referred to Cuba's "availing itself of the right which Article 63 of the Statute of the Court confers on States parties to a convention, . . ." (*Haya de la Torre, Judgment, I.C.J. Reports 1951*, p. 71, at p. 76). Also, in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, the Court observed:

> "The Statute of the Court provides for two different forms of intervention : one under Article 62 . . .; and the other under Article 63 which gives parties to a convention the construction of which is in question in a case 'the right to intervene in the proceedings'." (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application by Malta for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 3, at p. 13.)

(See also, e.g., T. O. Elias, *The International Court of Justice and Some Contemporary Problems*, p. 93 (1983); G. Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-4", 34 *British Year Book of International Law*, p. 1, at p. 124 (1958); M. Dubisson, *La Cour internationale de Justice*, p. 237 (1964).)

Thus, the only conditions for intervention under Article 63 of the Statute of the Court are that the construction of a multilateral convention be at issue and that the State requesting intervention be a party to the convention. Where these conditions are met, the State has an absolute right to intervene. The role of the Court in deciding "whether an intervention under Article 63 of the Statute is admissible", as provided by Article 84 (2) of the Rules of Court, is in this respect a limited one:

> "Although intervention under this Article [63] is as of right, provided the conditions stated in it are fulfilled, it is naturally for the Court to decide whether they are actually satisfied or not ... Given that these conditions are present, the Court is bound to admit the intervention, and has no discretionary power in the matter, as it would seem it must have under Article 62 ..." (G. Fitzmaurice, *op. cit.*, p. 127.)

Similarly, the distinguished President of the Court has written:

> "Intervention under Article 63 is open to all those States that can show that the construction of an international convention, to which they are all parties, is involved; no other requirement need be fulfilled before an intervening State can participate in such proceedings before the Court. *Intervention under Article 63 is, on this basis, automatic* for the State intending to intervene." (T. O. Elias, *loc. cit.* (emphasis supplied).)

The "automatic" nature of intervention under Article 63 is illustrated by the decision of the Permanent Court of International Justice in *S.S. "Wimbledon"*, in accepting the request by Poland to intervene:

> "It will suffice for the Court to note that in this case the interpretation of certain clauses of the Treaty of Versailles is involved in the suit and that the Polish Republic is one of the States which are parties to this treaty.
>
> In view of the facts established above, which are conclusive, and of the statements made at the hearing by the representatives of the applicant Powers, who left the matter to the decision of the Court.
>
> *the Court records* that the Polish Government intends to avail itself of the right to intervene conferred upon it by Article 63 of the Statute." (*Judgments, op. cit.*, p. 13.)

The use of "records" here rather than "decides" emphasizes that acceptance of the intervention follows necessarily from a determination that the factual conditions are met; the latter are, in the words of the Judgment, "conclusive". Similarly, as discussed below, this Court in *Haya de la Torre* based its decision on the finding that "the intervention of the Government of Cuba conformed to the conditions of Article 63 of the Statute ..." (*op. cit.*, p. 77).

The facts supporting El Salvador's right to intervene are clear. El Salvador is a party to the Charter of the United Nations, including the Statute of the Court. The Charter, including the Statute, are conventions and as such are subject to Article 63. (See, e.g., *Corfu Channel, Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948*, p. 15, at p. 23; *Anglo-Iranian Oil Co., Judgment, I.C.J. Reports 1952*, p. 93, at p. 96.) Questions of interpretation of the Charter and Statute are incontestably at issue in this phase of the case. El Salvador is accordingly entitled to intervene pursuant to Article 63 in this stage of proceedings, automatically and as of right.

2. *El Salvador's Intervention Is Related to Questions of Treaty Interpretation in Issue in This Phase of the Proceedings*

While a State may have the right to intervene in any case concerning the interpretation of a treaty to which it is a party, the intervention must relate to the questions of treaty interpretation which are in issue before the Court. This is principally illustrated by the case of *Haya de la Torre*.

In *Haya de la Torre*, the Government of Cuba filed a Declaration of Intervention, to which it attached a Memorandum constituting, in the view of the Court, its written observations pursuant to Article 66 (4) of the 1946 Rules of Court (the predecessor of present Article 86 (1)). The Government of Peru objected to the admissibility of this intervention, *inter alia*, on the grounds that in substance, Cuba's views were related to questions decided in an earlier judgment and were aimed, in effect, at reconsideration of that judgment.

The Court observed

> "that every intervention is incidental to the proceedings in a case; it follows that a declaration filed as an intervention only acquires that character, in law, if it actually relates to the subject-matter of the pending proceedings" (*Haya de la Torre, op. cit.*, p. 76).

The Court further observed that Cuba's

> "Memorandum . . . is devoted almost entirely to a discussion of the questions which the Judgment of November 20th, 1950, had already decided with the authority of *res judicata*, and that, to that extent, it does not satisfy the conditions of a genuine intervention." (*Ibid.*, p. 77.)

Nonetheless, as Cuba did identify a question of interpretation of a treaty to which it was a party, which was at issue in the pending proceedings, Cuba's intervention was admissible to that extent:

> "Reduced in this way, and operating within these limits, the intervention of the Government of Cuba conformed to the conditions of Article 63 of the Statute . . ."

The Court has subsequently confirmed its holding in *Haya de la Torre*:

> "In *[Haya de la Torre]* the Court stressed that, under Article 63, intervention by a party to a convention the construction of which is in issue in the proceedings is a matter of right. At the same time, however, it also underlined that the right to intervene under Article 63 is confined to the point of interpretation which is in issue in the proceedings, and does not extend to general intervention in the case." (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), op. cit.*, p. 15.)

(See also, e.g., *Continental Shelf (Libyan Arab Jamahiriya/Malta), op. cit.*, p. 99 (diss. op. Oda).)

The limited scope of intervention under Article 63 is also reflected in the text of the Article itself, which limits the binding effect of a judgment on the intervening State. As specified by Article 63 (2), when a State intervenes in proceedings, "*the construction given by the judgment* will be equally binding upon it" (emphasis supplied).

Thus, notwithstanding that a State may have the right to intervene, "*[t]he intervention must be adequately related to the subject-matter of the current proceedings*" (Fitzmaurice, *op. cit.*, p. 128 (emphasis in original)).

In the view of the United States, there is no room for doubt that El Salvador's intervention is directly related to the subject-matter of the current phase of proceedings. As stated in its Declaration of Intervention and confirmed by its letter of 10 September, El Salvador intends to address certain preliminary questions of treaty interpretation which specifically and exclusively relate to jurisdiction and admissibility. It is amply evident from the Nicaraguan and United States pleadings that these questions are in issue in the current stage of proceedings.

El Salvador has stated moreover that, while reserving its rights, it seeks at present to intervene only with respect to the current phase of proceedings. This Court has already confirmed that intervention may be limited solely to one or another stage of proceedings. In *Nuclear Tests (New Zealand* v. *France)*, the Court found that Fiji's requested intervention under Article 62 "by its very nature presupposes that the Court has jurisdiction to entertain the dispute . . . and that New Zealand's application against France in respect of that dispute is admissible". Accordingly the Court deferred consideration of its acceptance until after the determination of jurisdiction and admissibility. (*Nuclear Tests (New Zealand* v. *France), Application to Intervene, Order of 23 July 1973, I.C.J. Reports 1973*, p. 324.)

It follows that an intervention may also, by its nature, relate solely to jurisdiction and admissibility. For example, the possibility of intervention pursuant to Article 63 solely with respect to questions of jurisdiction and admissibility has been recognized by the Court in *Corfu Channel, loc. cit.*, and by Judge Lauterpacht in *Certain Norwegian Loans, Judgment* (*I.C.J. Reports 1957*, p. 9, at pp. 63-64 (sep. op. Lauterpacht)) and *Interhandel, Interim Protection, Order of 24 October 1957* (*I.C.J. Reports 1957*, p. 105, at p. 120 (sep. op. Lauterpacht)).

It is, accordingly, in the nature of intervention under Article 63 that it could be limited to one or another stage of proceedings, depending on the questions of treaty interpretation which form the basis for the right to intervene. Moreover, the interpretation contended for by the intervening State may itself imply such a limitation. This would appear to be the case here, since a major purpose of El Salvador's intervention is to argue that consideration of the merits of the Nicaraguan Application would be contrary to the Charter of the United Nations, with serious prejudice to El Salvador's interests and rights.

In sum, the United States respectfully submits its view that El Salvador is entitled to intervene in this case pursuant to Article 63 of the Statute of the Court, as a State party to multilateral conventions whose construction is at issue in this phase of the case. Further, as we understand the object and scope of El Salvador's proposed intervention, it is appropriately related and inherently limited to the current phase of proceedings. Accordingly, the United States sees no ground for objection to the admissibility of this intervention.

(Signed) Davis R. ROBINSON,
Agent of the United States of America.

LETTER FROM THE AGENT OF EL SALVADOR TO THE REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE

Rome, 17 September 1984.

Re: Declaration of Intervention of the Republic of El Salvador.

We refer to the observations submitted by Nicaragua on the Declaration of Intervention of El Salvador.

1. Nicaragua purports not to object to the intervention. Indeed, it even "agrees" to it. If this agreement is taken at face value, then neither of the existing Parties entertains any objection with respect to El Salvador's participation as an intervenor under Article 63 of the Statute. In these circumstances it would seem appropriate that the Court record the intervention forthwith as "automatic".

2. Nicaragua does, however, go on to suggest that the Declaration has certain deficiencies.

A. The alleged deficiency of form is frivolous. Nicaragua and the Court are fully on notice of the issues of treaty interpretation regarding jurisdiction and admissibility. El Salvador's Declaration of Intervention appropriately identifies those issues and El Salvador's construction. Moreover, El Salvador's 10 September 1984 communication (to which Nicaragua fails to refer) resolves any conceivable ambiguity by carefully and particularly identifying the provisions of the conventions to which El Salvador is a party whose interpretation is at issue in this present jurisdictional and admissibility stage of the proceeding, and the constructions for which it contends.

B. The alleged deficiency as to substance is equally spurious. Nicaragua suggests that Article 63 intervention is inapposite to the jurisdictional phase of the proceeding even if conventions to which the intervenor is a party are centrally at issue in that stage. This makes no practical sense and totally contradicts the plain meaning of Article 63, which makes no such distinction.

3. Nicaragua refers to Article 85 of the Rules of Court. This is a mistake. Article 85, by its express terms, governs only procedures for interventions under Article 62 of the Statute of the Court. El Salvador intervenes, as a matter of right, under Article 63. The rule that governs procedure in such cases is Article 86, which provides as follows:

> "1. If an intervention under Article 63 of the Statute is admitted, the intervening State shall be furnished with copies of the pleadings and documents annexed, and shall be entitled, within a time-limit to be fixed by the Court, or by the President if the Court is not sitting, to submit its written observations on the subject-matter of the intervention.
>
> 2. These observations shall be communicated to the parties and to any other State admitted to intervene. The intervening State shall be entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention."

Article 86 clearly provides that El Salvador is entitled to receive the pleadings and annexes of the Parties, is entitled to a reasonable time thereafter to prepare and present its written observations on the convention provisions at issue in the jurisdictional phase of the case, and is then entitled to participate in the subsequent oral proceedings before the Court. El Salvador submits that a period of six weeks would be an appropriate time-limit for the preparation of its observations, on the understanding that this is the amount of time permitted to the Parties to prepare their submissions.

4. Nicaragua's observations constitute an attempt to object to El Salvador's Declaration of Intervention while, at the same time, preventing El Salvador from exercising its procedural right to oral proceedings before the Court in the event of an objection. On the one hand, Nicaragua purports not to object in order to avoid triggering El Salvador's automatic right to a hearing under Article 84 (2) of the Rules of Court when an "objection" is received. On the other hand, Nicaragua then launches a full-scale attack on both the form and the substance of the Declaration in what constitutes as strong and clear an "objection" as one can imagine. Nicaragua, in short, disclaims opposing El Salvador's intervention, but then offers lengthy alternative explanations why the Court should find the intervention inadmissible. It is inconceivable that the Court should proceed in the peremptory and injudicious fashion that Nicaragua invites. Either Nicaragua should be taken at its word and the Declaration of Intervention admitted as the exercise of an automatic right fully consistent with Article 63 of the Statute and Article 84 of the Rules due to the absence of any objection from either Party, or Nicaragua's observations must be recognized as the objection that the document undeniably is and El Salvador allowed the oral proceedings which Article 84 (2) of the Rules requires when an objection is received.

5. El Salvador's interest in the question whether this Court has jurisdiction and whether the Nicaraguan application is admissible is authentic and vital to its own national interest. The authority of the recognized government is under armed attack. That armed attack is being carried out by an externally supported minority. That minority refuses to accept the democratically expressed will of the people of El Salvador. Nicaragua's denial that it supports that minority is contradicted by the facts set forth in El Salvador's Declaration of Intervention.

6. In the face of that armed attack on the duly constituted, recognized authority, El Salvador's elected government is actively seeking an end to the conflict. To that purpose it is pursuing all negotiating avenues to peace within its own territory and throughout Central America. El Salvador is persuaded in the consideration of its own survival as a nation that to subject an isolated aspect of the Central American conflict to judicial determination at this time would cut straight across the best hopes for a peaceful solution. It would as well conflict with the Charters of the United Nations and the Organization of American States, of which El Salvador is a ranking member.

7. This is the reason El Salvador has invoked its automatic right to intervene at this stage of the proceedings. This is also why it would be unjust as well as wrong in law for the Court to accept Nicaragua's thinly veiled invitation to reject that intervention out of hand, in violation of El Salvador's substantive rights under the charter of the Court and procedural rights under the Rules of Court.

In the name and on behalf of
the State of El Salvador,

(Signed) Ivo P. ALVARENGA,
Ambassador,
Agent to the International Court of Justice.

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